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No. 734

In the United States Court of Appeals

For the Seventh Circuit

No. 11989

CHARLES R. HARD,
Petitioner,

v.

CIVIL AERONAUTICS BOARD,
Respondent.

Petition for Review of an Order of the Civil Aeronautics Board.

APPENDIX FOR PETITIONER.

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APPENDIX.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

CHARLES R. HARD, Petitioner
vs.
CIVIL AERONAUTICS BOARD, Respondent
No. 11989

PETITION FOR REVIEW.

The Petitioner, Charles R. Hard, by his Attorney George F. Archer, respectfully presents this Petition for Review of an Order No. S-779 of the Respondent, Civil Aeronautics Board, dated February 6, 1957, and states:

I.

Nature of the Proceedings as to Which Review is Sought.

1. On February 7, 1956, Petitioner Charles R. Hard while captain-in-command of Eastern Air Lines Trip 156, a Martin 404 engaged in air commerce between Evansville, Indiana and Owensboro, Kentucky was involved in an accident at the Owensboro Airport in which the aircraft was damaged but in which there were no personal injuries.

2. On March 8, 1956, the Administrator of Aeronautics alleging authority under the emergency clause of Section 609 of the Civil Aeronautics Act, as amended, 52 Stat. 1011, 49 U.S.C. 559, suspended Petitioner's Airline Transport Pilot Certificate for a period of thirty days on the grounds that the Owensboro incident disclosed facts which revealed Petitioner lacked competency and judgment necessary for an Airline Transport Pilot Certificate. This suspension was renewed for an addi-

tional thirty day period up to and including May 7, 1956.

3. On March 16, 1956, the Administrator again alleging jurisdiction under Section 609 of the Act filed a Complaint with the Civil Aeronautics Board, requesting that the Petitioner's Airline Transport Pilot Certificate be revoked or suspended for lack of qualification.

4. On March 22, 1956, Respondent, through its Bureau of Safety Investigation, under authority of Subchapter 7 of the Act, 64 Stat. 972, 49 U.S.C. 581, 582, held public hearings and took testimony of witnesses including that of the Petitioner.

5. On April 4, 1956, Petitioner Hard answered the Administrator's Complaint and concurrently filed a Motion to Dismiss on the grounds that:

a. On March 3, 196, Petitioner Hard was given a thorough check ride in a Martin 404 by one Burt Poe, Eastern Air Lines Check Pilot, and certified and designated by the C.A.A. to give such instrument check rides and examinations for proficiency, and that on March 4, 1956, Petitioner Hard was given a six months proficiency instrument check ride test and examination by Poe and was at the same time checked by the C.A.A. Safety Agent, William Feast, who passed Hard as to all qualifications including judgment.

b. The Administrator had misconceived his action and was, in fact, arbitrarily using a remedial statute to invoke a penalty. Petitioner requested that if the Motion to Dismiss were denied that it be certified by the C.A.B. Examiner directly to the Board.

6. On April 6, 1956, the Motion to Dismiss was denied by the Respondent's Hearing Examiner on the grounds that:

"It appearing that the first ground of Respondent's motion is not a basis for a motion to dismiss but is rather appropriate for defense upon the merits, and that the second ground is inconsistent with the

Board's safety enforcement proceeding practice since the earliest reported case as an objection to procedure and an issue for trial upon the merits in substance."

7. The request to certify the question to the Board was denied.

8. On April 26, 1956, the C.A.B. Examiner held a trial on the merits of the issues formed by the Complaint and Answer.

9. The Examiner found that the "emergency suspension" was in the public interest but found no violation of any rule, regulation or statute; that there was no further need for examining Petitioner's qualification as an airline captain; that the "emergency suspension" be terminated effective May 7 (the date which the second suspension period would have expired in any event), whereupon Petitioner resumed his status as an Airline Transport Pilot with Eastern Air Lines.

10. On June 1, 1956, the Administrator appealed this decision asking the Board to find that the Petitioner violated certain Civil Aeronautics Regulations and that he demonstrated a lack of the degree, care, skill, and responsibility required of a holder of an Airline Transport Pilot Rating and requested that Petitioner Hard's A.T.R. be revoked because of lack of qualification.

11. Petitioner Hard thereupon prayed to the Board that the Initial Decision of the Examiner be sustained and his proposed findings and conclusions be adopted, but excepting that part of the Initial Decision known as Findings IV and VII referring to the approach pattern of Flight 156 to the Owensboro Airport.

12. On July 5, 1956, the Respondent, Civil Aeronautics Board, issued its Accident Investigation Report on the February 7, 1956 Owensboro incident.

13. On February 6, 1957, the Respondent, Civil Aeronautics Board, issued a decision on the case ordering

(Order No. S-779) a six months suspension (giving credit for the 60 days which Hard had been suspended as a result of the emergency action) of Petitioner Charles R. Hard's Airline Transport Pilot Rating effective February 26, 1957.

14. This "suspension" was because the Board determined that disciplinary action was called for and that it must impose a sanction by a substantial suspension of Petitioner Hard's rating to provide a sufficient deterrent against Hard and other pilots.

15. This Petition is for a review of that February 6, 1957 Order (No. S-779) of the Respondent, Civil Aeronautics Board, imposing a six month suspension sanction on the Petitioner.

16. The effective date of the Respondent's Order No. S-779 was postponed until March 11, 1957, all of which appears in the accompanying Motion to Stay which is annexed hereto and made a part hereof.

II.

The Facts Upon Which Venue is Based.

Petitioner Charles R. Hard is a resident of Western Springs, Illinois. Section 1006(a) of the Civil Aeronautics Act, as amended, 63 Stat. 107, 49 U.S.C., 646(a) provides for a judicial review of any order issued by the Authority under the Act. Section 1006(b) provides venue in the circuit wherein the Petitioner resides. Petitioner also invokes jurisdiction under Section 1009 of the Administrative Procedures Act, 5 U.S.C. 1009.

III.

The Grounds on Which Relief is Sought.

The relief is sought on the grounds that the Respondent, Civil Aeronautics Board, was without jurisdiction to hear, or power to impose a penalty action under the Civil Aeronautics Act and that it was an error to try a

case under Section 609 on the grounds that the airman lacked qualifications for an Airline Transport Pilot Rating and then to find that he was so qualified but to issue a deterrence sanction against him when the Act (Sections 901 and 902) specifically requires that such proceedings shall be processed in the appropriate district court with the provision for a trial by jury. (Section 903(b) (1).

IV.

The Relief Prayed.

Wherefore, Petitioner, Charles R. Hard, prays that the Court:

1. Reverse the Order (S-779) of the Civil Aeronautics Board with instructions to dismiss the Complaint.

2. Permanently enjoin the Board from misapplying the remedial procedure of the Act in order to invoke a penalty, deterrence or sanction.

3. Such other just and appropriate relief as the Court deems proper.

Respectfully submitted,
/s/ F. Harold Bennett
F. Harold Bennett
/s/ George F. Archer,
George F. Archer,
Attorneys for Petitioner
Charles R. Hard

Address for service:
c/o Air Line Pilots Assn.
55th St. & Cicero Ave.
Chicago 38, Illinois
Dated at Chicago, Illinois
this 6th day of March, 1957.

TIME AND MANNER OF THE PROCEEDINGS BELOW SO FAR AS APPLICABLE TO THE MATTER UNDER APPEAL
DOCKET NO. SR-2210

C. J. LOWEN, JR.,
Administrator of Civil Aeronautics,
Complainant

—vs—

CHARLES R. HARD,
Respondent

Appearances:

For Complainant:
Robert P. Boyle, Esq.
Gerald F. White, Esq.
Ned K. Zartman, Esq.

For Respondent:
F. Harold Bennett, Esq.

1956

March	8	Administrator of Aeronautics by his agent suspended for thirty days the Airline Transport Rating of respondent Chas. R. Hard.
March	16	Administrator's Complaint filed and served.
March	22	C.A.B. Bureau of Safety Investigation held
	23	public hearings on the Owensboro, Ky. incident of Feb. 7, 1956.
April	3	Emergency suspension of Hard's Airline Transport Rating renewed for an additional 30 days.
April	4	Respondent's Answer filed and served.
April	4	Respondent's Motion to Dismiss and Memorandum and affidavit in Support thereof filed and served.

April	4	Respondent's letter to C.A.B. Hearing Examiner Moorhead requesting that Motion to Dismiss, if denied by Examiner. be certified to the Board for disposition.
April	6	Complainant's letter to Hearing Examiner opposing Respondent's Motion to Dismiss.
April	6	Examiner's Order denying Motion to Dismiss.
April	26, 27, 28	Hearing on the merits held Before Examiner Moorhead of the Civil Aeronautics Board in Chicago, Illinois.
April	28	Examiner rendered Opinion, Findings and Order (oral) at close of hearing.
May	2	Examiner's Order of Clarification.
May	3	Notice of Appeal to the Board filed and served by Complainant.
May	7	Notice of Appeal to the Board filed and served by Respondent.
May	7	Respondent's request for extension of time to June 25, 1956 to file Specification of Errors.
May	9	Complainant filed and served opposition to extension of time.
May	16	General Counsel for Civil Aeronautics Board letter granting extension through June 1 for filing Specification of Errors and Exception to Initial Decision.
May	31	Respondent's Specification of Errors and Exception to Initial Decision of the Hearing Examiner and Brief in support thereof filed and served.
June	1	Complainant's Specification of Errors and Argument in Support of Appeal filed and served.
June	15	Respondent's Reply Brief filed and served.

July 5 C.A.B. adopted Accident Investigation Report of the Owensboro, Ky., accident of Feb. 7, 1956.

July 10 C.A.B. released above Accident Investigation Report.

1957

February 6 Order of Civil Aeronautics Board (S-779) issued ordering 6 months suspension of the Respondent's Airline Transport Pilot Rating effective February 26, 1957.

February 19 Respondent's Motion to stay effective date of order pending appeal filed and served.

February 21 Complainant's Reply to Respondent's Motion to Stay not objecting to staying the effective date of the Stay Order providing said Stay does not extend beyond the date to which a Petition for Reconsideration is due.

February 21 The Board's Order staying the effective date of its Order S-779 until March 11 provided that Respondent file a Motion for Reconsideration.

March 6 Respondent (Petitioner herein) filed Petition For Review by U. S. Court of Appeals, Seventh Circuit.

March 6 Respondent (Petitioner herein) filed Motion for stay of effective date of Board's order.

March 11 Order granting motion for stay pending determination for review by this Court signed by Hon. F. Ryan Duffy, Chief Judge.

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BEFORE THE CIVIL AERONAUTICS BOARD
Washington, D. C.

C. J. LOWEN, JR., Administrator of Civil Aeronautics,
Complainant,
v.
CHARLES R. HARD,
Respondent.
} Docket No. SR-2210

COMPLAINT
(Received Mar. 16, 1956)

C. J. Lowen, Jr., Administrator of Civil Aeronautics, by his attorneys, alleges:

1. The jurisdiction of this Board is invoked under 609 of the Civil Aeronautics Act of 1938, as amended, [52 Stat. 1011, 49 U.S.C. 559].

2. The respondent is and has been at all times material herein the holder of Airman Certificate No. 45366-40 with an Airline Transport Rating.

3. That, on February 17, 1956, the respondent was employed and designated by Eastern Air Lines, Inc., as pilot-in-command of a Martin 404 aircraft, Identification No. N-445A, said aircraft then being engaged in scheduled air transportation as Eastern Air Lines' Flight 156.

4. That EAL Flight 156 departed from Evansville, Indiana, at approximately 1441 EST, en route to Owensboro, Kentucky, on an approved IFR flight plan to cruise at 2,000 feet.

5. That EAL Flight 156 arrived over the radio facility identified as Commercial Broadcast Station WVJS located approximately 1.9 miles north of Owensboro-Daviess County Airport and proceeded in the direction of the Owensboro-Daviess County Airport.

6. That EAL Flight 156 arrived at or over the Owensboro-Daviess County Airport, after which tt proceeded in a southwesterly direction and descended to an altitude of approximately 100 feet above the terrain while on the downwind leg for the runway of intended landing.

7. That after flying on the downwind leg in a southwesterly direction and at an altitude of about 100 feet above the terrain for a distance unknown to the complainant, the respondent maneuvered said aircraft into a steep left turn in an effort to turn the aircraft in the direction of the airport and the runway of intended landing.

8. That respondent failed to properly align the aircraft in flight for a normal landing on said runway; that said aircraft struck the ground short and to the right of Runway 5, causing extensive damage to the aircraft.

9. That respondent during the approach to the runway of intended landing operated said aircraft contrary to safe operating practices for a Martin 404 and in such a manner as to cause it to crash.

10. That the respondent operated said aircraft in a careless and reckless manner.

11. That respondent's operation of said aircraft, as alleged in Paragraphs 6, 7, 8, 9, and 10 herein, endangered the lives of the passengers and crew aboard EAL Flight 156, as well as the property of Eastern Air Lines, Inc.

12. That the respondent demonstrated, by his operation of said aircraft on EAL Flight 156, a lack of the technical proficiency and skill required of the holder of an Airline Transport Rating.

13. That the respondent operated said aircraft on EAL Flight 156 in violation of the following Civil Air Regulations:

a. Section 60.12, in that he operated the aircraft in a careless and reckless manner which endangered the lives and property of others; and

b. Section 40.18(a), in that he operated the aircraft contrary to Paragraph 32 of Eastern Air Lines' Operations Specifications by descending below 857 feet MSL prior to reaching a position from which a normal approach could be made to the runway of intended landing.

14. That the respondent by his conduct, as pilot-in-command of EAL Flight 156, demonstrated that he lacks the care, judgment and responsibility required of the holder of an Airline Transport Rating, in that as heretofore alleged he:

a. performed unsafe maneuvers with said aircraft at an insufficient altitude;

b. attempted a final approach to the runway of intended landing when it was unsafe to do so, and thereby endangered the lives and property of others; and

c. failed to adhere to the highest standard of safety required by the Civil Aeronautics Act, and established by the Civil Air Regulations and the Operations Specifications of Eastern Air Lines.

15. That an authorized agent of the Administrator of Civil Aeronautics made an emergency suspension of respondent's Airline Transport Rating, effective March 9, 1956, for a period of 30 days.

16. That if the Board finds respondent committed the violations heretofore alleged, but fails to find that an order revoking respondent's Airline Transport Rating should be issued, the public interest requires a suspension of respondent's Airman Certificate.

Wherefore, the Administrator of Civil Aeronautics requests that the Airline Transport Rating of respondent's Airman Certificate be revoked for lack of qualification or,

failing the entry of an order of revocation, that respondent's Airman Certificate be suspended.

Dated this 16th day of March, 1956.

Respectfully submitted,

/s/ R. P. Doyle
Robert P. Boyle
Civil Aeronautics Administration

/s/ Gerald F. White
Gerald F. White
Chief, Enforcement & Litigation Division
Civil Aeronautics Administration

/s/ Ned K. Zartman
Ned K. Zartman
Trial Attorney
Civil Aeronautics Administration

12 (Letterhead of AIR LINE PILOTS ASSOCIATION)
(Received Apr. 5, 1956)

April 4, 1956

Mr. H. G. Moorhead
Hearing Examiner
Civil Aeronautics Board
Washington 25, D. C.

RE: Lowen vs. Hard,
Docket SR-2210.

Dear Mr. Moorhead:

Upon my return to the Home Office your letter of March 29, 1956 concerning our request for an extension of time to answer the Administrator's Complaint was on my desk for attention.

Our understanding with Mr. Zartman, Counsel for the Administrator, was that an extension of time to include Monday, April 9, would be agreeable, however, we have been able to gather the material necessary to our pleadings

and have filed the same as of this date, a copy is attached for your information. Our pleadings were due on Thursday, March 29, and it is therefore necessary to have the record reflect an extension of time until Wednesday, April 4. We ask that such an order be entered.

With respect to the expeditious disposition of the case, certainly we should be, and we are, most anxious for an early determination. It is our feeling however that we have been most grievously dealt with by the Administrator, and while we desire to cooperate within a realm of reason, we have no intention of being rushed into a hearing until we have had ample time to prepare. Additionally, we have every confidence that our Motion to Dismiss is proper, should be granted, and if you are in disagreement we desire that the question be certified to the Board for disposition before we are forced into a trial under the present Complaint.

Sincerely yours,
Air Line Pilots Association
/s/ F. Harold Bennett
F. Harold Bennett
Legal and Conciliation Dept.

FHB:jp
cc: C. N. Sayen, Pres., ALPA
N. Zartman, CAA, Trial Attorney

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BEFORE THE CIVIL AERONAUTICS BOARD
Washington, D. C.

• • (Caption—Docket No. SR-2210) • •

RESPONDENT'S MOTION TO DISMISS

(Received Apr. 6, 1956)

Comes Now the Respondent, Charles R. Hard, and states that the Complainant is not entitled to the relief prayed and moves the Board to dismiss the Complaint herein upon the following grounds:

1) Prior to the filing of the Complaint herein, which seeks revocation of Respondent's Airline Transport Rating, or in the alternative that Respondent's Airman Certificate be suspended, because Respondent "lacks qualification", Respondent was tested and fully examined by the Administrator and successfully demonstrated that he does not lack qualification to retain both his Airline Transport Rating and his Airman Certificate.

2) The Administrator has misconceived his action in seeking revocation of Respondent's Airline Transport Rating or in the alternative suspension of Respondent's
15 Airman Certificate upon the sole ground as alleged in the Complaint, i.e., that he lacks qualifications, in that, the Administrator is seeking to invoke such revocation as a penalty, and not for remedial purposes because at the time of the filing of the Complaint herein, the Respondent was known by the Administrator to be qualified.

Respectfully submitted,
/s/ F. Harold Bennett
F. Harold Bennett,
Attorney for Respondent

Dated at Chicago, Illinois, this 4th day of April, 1956.

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BEFORE THE CIVIL AERONAUTICS BOARD
Washington, D. C.

• • (Caption—Docket No. SR-2210) • •

MEMORANDUM IN SUPPORT OF MOTION TO DISMISS
(Received Apr. 6, 1956)

I.

Prior to the filing of the Complaint herein, which seeks revocation of Respondent's Airline Transport Rating, or in the alternative that Respondent's Airman Cer-

tificate be suspended, because Respondent "lacks qualification", Respondent was tested and fully examined by the Administrator and successfully demonstrated that he does not lack qualification to retain both his Airline Transport Rating and his Airman Certificate.

The incident in which the Respondent was involved, and which brought about the summary suspension of his Airline Transport Rating by the Administrator on March 9, 1956, occurred at Owensboro-Daviess County Airport on February 17, 1956. Following the incident in question and on March 4, 1956, Respondent was given the usual and customary six months Instrument Proficiency Check Ride and examination by Burt Poe, Eastern Air Lines Check Pilot and a Civil Aeronautics Administration designee for such purposes, and William Feast, Civil Aeronautics Administration Safety Agent, Air Carrier Operations,
17 Atlanta, Georgia, in which said six months Instrument Proficiency Check Ride and examination the Respondent, Charles H. Hard, successfully demonstrated his capabilities to retain his Airline Transport Rating and Airman Certificate, all as more fully set forth in the Affidavit of the Respondent Charles R. Hard, and the report of William Feast, Civil Aeronautics Administration Safety Agent, hereto attached and made a part hereof. Thus the Respondent, prior to the filing of the Complaint herein, was reexamined by the Administrator, and demonstrated to the full satisfaction of said Administrator that he (the Respondent) is fully qualified to retain his Airline Transport Rating and his Airman Certificate. Moreover, the Respondent, with the knowledge of the Administrator and without objection from him, was returned by Eastern Air Lines to flying the line as captain-in-command in scheduled airline transportation and on March 8, 1956 Respondent flew in such capacity; additionally, the Re-

spondent, with the knowledge and consent of the Administrator, has been flying the line in the employ of Eastern Air Lines as Copilot in scheduled airline transportation and has been so engaged since March 9, 1956, and is presently so engaged.

The Administrator has on the one hand, filed his Complaint before this Board seeking revocation of Respondent's Airline Transport Rating or in the alternative suspension of Respondent's Airman Certificate upon the sole ground that the Respondent "lacks qualification"; on the other hand, and prior to the filing of said Complaint, the Administrator by and through his Agent, William Feast,

Civil Aeronautics Administration Safety Agent, Air
18 Carrier Operations, Atlanta, Georgia, tested and examined Respondent, failed to find that he lacked any required qualification, and has in fact pronounced Respondent efficient and proficient in every usual and required regard, all as illustrated by Respondent's Affidavit and the report of the said William Feast, Civil Aeronautics Administration Safety Agent for that purpose, hereto attached.

The prayer for relief in the Administrator's Complaint reads as follows:

> "Wherefore, the Administrator of Civil Aeronautics requests that the Airline Transport Rating of respondent's Airman Certificate be revoked for lack of qualification, or, failing the entry of an order of revocation, that respondent's Airman Certificate be suspended."

The sole thrust of the Administrator's Complaint is directed at "remedial relief", due solely to the Respondent's alleged incapacities to perform his work efficiently; yet, the Administrator as required by Section 609 of the Civil Aeronautics Act, had, previous to the filing of the Complaint herein, reexamined the Respondent and by written report of said reexamination pronounced Respondent

proficient in very required regard. In the light of the Administrator's reexamination of the Respondent prior to the filing of the Complaint therein, and his finding that the Respondent possesses all of the required abilities and qualifications necessary to retain his Airline Transport Rating and Airman Certificate, the paramount and basic issue raised by the Complaint, namely: Whether or not Respondent "lacks qualifications", becomes moot.

19 Since the Respondent has been tested and examined by the Administrator subsequent to the happening of the incident complained of, and prior to the filing of the Complaint herein; and since the Respondent has successfully demonstrated to the satisfaction of the Administrator his (Respondent's) qualifications to retain his Airline Transport Rating and his Airman Certificate; and since the Respondent is presently flying as Copilot in scheduled airline transportation, with the knowledge and consent of the Administrator, it is submitted that the Administrator cannot now be heard to contend that the Respondent's Airline Transport Rating should be revoked upon the ground that the Respondent "lacks qualification", or that the Respondent's Airman Certificate should be suspended upon such grounds.

II.

The Administrator has misconceived his action in seeking revocation of Respondent's Airline Transport Rating or in the alternative suspension of Respondent's Airman Certificate upon the sole ground as alleged in the Complaint, i.e., that he lacks qualification, in that, the Administrator is seeking to invoke such revocation as a penalty, and not for remedial purposes because at the time of the filing of the Complaint herein the Respondent was known by the Administrator to be qualified.

Examination of the Affidavit of the Respondent attached to his Motion to Dismiss discloses that he is 44

years of age, and has been engaged in the occupation of a commercial airline pilot with Eastern Air Lines continuously since December 1942; first as a copilot between December 1942 and August 1946 and then as captain-in-command until the summary suspension of his Airline Transport Rating by the Administrator on March 9, 1956. That in all this time the Respondent was never involved in an incident or accident nor in any violation of the Civil Air Regulations. Moreoever, subsequent to the incident which occurred on February 17, 1956, and prior to the filing of the Complaint herein, the Respondent was examined by the Administrator and pronounced by written report of the Administrator's Agent William Feast, Civil Aeronautics Administration Safety Agent, Air Carrier Operations, Atlanta, Georgia, as possessing all of the required abilities and qualifications to retain his Airline Transport Rating and his pilot's certificate. In the face of this overwhelming evidence that Respondent does not "lack qualification" to retain both his Airline Transport Rating and his pilot's certificate, all of which was at the time well known to the Administrator, he (the Administrator) nevertheless on March 9, 1956, summarily suspended Respondent's Airline Transport Rating upon the "theory" that the Respondent "lacked qualification". As required by Section 609 of the Civil Aeronautics Act, under which section the Administrator presumes to act, he then filed his Complaint herein seeking the Board's sanction of his actions. The difficulties encountered in the application of the Administrator's theories lie in his approach to the problem of enforcement of the Civil Air Regulations. He seeks to foster upon this Board the use of its "remedial" powers of revocation as a "penalty". The Statutes were not so designed and they will not "work" to accomplish such a misapplication.

It is folly for the Administrator to charge a licensee with "lacking qualification" to exercise the privilege of his Airline Transport Rating or pilot's certificate because of a single inadvertent violation of the Civil Air Regula-
21 tions. Particularly is this true when, as here, the Administrator is in possession of facts which demonstrate that the Respondent has exercised the privileges of his license for a considerable period of years without incident or accident; and the Administrator has tested and reexamined the licensee and found him qualified in every required regard.

The Board's acceptance of the theories advanced by the Administrator in these proceedings will have the following amazing results:

1. A pilot's single infraction of a single air regulation no matter how inadvertent, subjects him to the revocation of his license, upon the Administrator's charge that by such infraction the pilot "lacks qualification".

2. Proof of the infraction is tantamount to proof of the "lack of qualification". The pilot whose license is thus revoked cannot apply for a re-issuance for a period of one year (CAB Section 21.21(b)).

3. Upon the pilot's application for re-issue of his license, the Administrator would be justified, if not required, to point to the judicial determination of the pilot's "lack of qualification" and refuse to re-issue the license; possibly forever.

4. There is no "yardstick" by which the Administrator can measure or determine the pilot's capacity for "qualification" (in the instant case the Administrator seeks revocation of Respondent's Airline
22 Transport Rating or in the alternative suspension of his pilot's certificate, notwithstanding that prior to the filing of the Complaint, the Administrator had exam-

ined the Respondent and pronounced him qualified in every required regard); therefore, there is no evidence which the pilot can produce to justify the re-issue of his license. There is no examination or test, the successful completion of which will demonstrate the pilot's requalification.

5. The Administrator will thus hold an arbitrary power of "life or death" over all pilot-licensees. He alone, by the use of some psychic processes will know and determine when the licensee has regained the "qualifications" necessary to the re-issue of his pilot license.

Can it be that the Administrator, in seeking revocation of the pilot's Airline Transport Rating, as in the instant case, has in mind that such license will never be restored? If that be the case, the Board's acceptance of the Administrator's theories and his approach to the problem of enforcement of the Civil Air Regulations, will create a most vexing problem indeed for all pilot-licensees, the Board and all other interested parties. We do not feel however, that the Administrator has any such thought in mind. Even if the pilot's license is "revoked" upon the charge by the Administrator that the licensee in this violation of the Civil Air Regulation has demonstrated he "lacks qualification", we envision a restoration of such
23 license by the Administrator after a period of time considered by him to be appropriate. If this be the case, has not the pilot's license only been "suspended"? Why then does the Administrator seek revocation which could finalize the license when in truth and in fact, he only intends a suspension. The answer is that the Administrator has misconceived his action and seeks to foster upon the Board its use of a "remedial power" in substitution for its power to "penalize". We urge upon the Board that "revocation" of a license upon the Administrator's charge

that the licensee in violating a single Civil Air Regulation, demonstrates him to "lack qualification" can spell finé to the licensee's career upon a single infraction of a Civil Air Regulation, no matter how inadvertent. To accept this theory and approach to the enforcement problem will not only do havoc to pilot-licensees, it will create additional problems to all interested parties, the end of which is not presently in sight.

CONCLUSION

For the reasons advanced herein, the Administrator is not entitled to the relief prayed in his Complaint and it is requested that the Complaint be dismissed.

/s/ F. Harold Bennett
F. Harold Bennett, Attorney for
Charles R. Hard, Respondent

April 4, 1956

24 AFFIDAVIT

State of Illinois } ss.
County of Cook }

I, Charles R. Hard, being first duly sworn on oath depose and say:

1. That I am 44 years of age and reside at 4942 Fair Elms Avenue, Western Springs, Illinois.

2. That I qualified as a private pilot at the Palmetto Air School, Spartanberg, South Carolina during the month of August 1940; and thereafter qualified for a commercial pilot's license at Palm Beach Aero School at Lantana Airport, Florida in July 1942.

3. That I received my instrument rating in December 1942 at a school conducted by Eastern Air Lines at Atlanta, Georgia and entered the employ of Eastern Air Lines as a copilot on that date; that I flew continuously

thereafter as a copilot in the employ of Eastern Air Lines until my promotion to captain as hereafter related.

4. That I received the required training for my Airline Transport Rating with Eastern Air Lines and acquired such Rating in August 1946; that I flew my first trip as captain-in-command on Eastern Air Lines in November 1946; that I have been continuously employed in such capacity since that date and until the summary suspension of my Airline Transport Rating by the Civil Aeronautics Administrator on March 9, 1956.

5. That to the date of the incident at the Owensboro-Daviess Airport, Owensboro, Kentucky on February 17, 1956 I have accomplished 10,491 hours of flight time as a commercial airline pilot, including approximately 1,443 instrument hours; that 3,532 such flight time hours were accomplished in the Martin 404 equipment.

6. That in the 16 years of my career as a commercial airline pilot, and until the incident at the Owensboro-Daviess Airport, Owensboro, Kentucky on February 17, 1956, I was never involved in an airline accident or incident; and have never been involved in any violation of the Civil Air Regulations.

7. That as a commercial airline pilot of Eastern Air Lines I have operated aircraft in and out of Owensboro-Daviess Airport, Owensboro, Kentucky, in excess of 100 times including numerous instrument approaches.

8. That following the incident at the Owensboro-Daviess Airport, Owensboro, Kentucky on February 17, 1956 I was directed by Eastern Air Lines to report to the Atlanta, Georgia base of that Company and on March 3, 1956 I was required to fly the Martin 404 equipment some 2½ hours under the observation of Burt Poe, Eastern Air Lines Check Pilot, and a designee of the Civil Aeronautics Administration to give commercial airline pilots Six Month Instrument Check Rides and Examinations for proficiency.

9. That on March 4, 1956 I was given the usual Six Month Proficiency Instrument Check Ride and Examination by Burt Poe and William Feast, Civil Aeronautics Administration Safety Agent, Air Carrier Operations, Atlanta, Georgia, which I completed to the satisfaction of Check Pilot Burt Poe, and CAA Safety Agent William Feast, all as indicated by a copy of said Proficiency Instrument Check Ride and Examination report of William Feast hereto attached and made a part hereof.

10. That having thus successfully completed the Six Month Proficiency Instrument Check Ride and Examinationto the satisfaction of the Company Check Pilot Burt Poe and the Civil Aeronautics Administration Safety Agent William Feast, I was returned to schedule flying by Eastern Air Lines on March 6, 1956, and on March 8, 1956 I flew as captain-in-command on a Martin 404 in scheduled operation from Chicago, Illinois to Charlotte, North Carolina.

11. That on the evening of March 8, 1956 upon my arrival in Charlotte, I was informed of the summary revocation of my Airline Transport Rating by the Civil Aeronautics Administrator; since that date I have been flying in scheduled airline operation with Eastern Air Lines as a copilot only.

Further, Affiant saith not.

/s/ Charles R. Hard
Charles R. Hard

Subscribed and sworn to before me
this 30th day of March, 1956.
(Seal) Janet Putz, Notary Public
My commission expires Nov. 9, 1957

27 U. S. Department of Commerce
Civil Aeronautics Administration

APPLICATION FOR PILOT CERTIFICATE OR RATING

(Attached and Made Part of Affidavit)

SPECIAL flight test report: 6-MO.CK.

1. Name (first, middle, last): C. R. Hard.
2. Permanent Mailing Address: • • • EAL ATL.

• • •

11. Aircraft to be used (make and model): M-404.

• • •

12. I certify that the statements made by me on this application are true.

28 14. • • •

15. Examiner's Recommendation and Action.

• • •

Given by W. B. Poe.

• • •

16. Agent's action: Approved.

Wm. E. Feast
Signature of Agent

Date: 3/4/56.

29 GRADING LEGEND

1.	Well above average	(90-100)
2.	Above average	(85-89)
3.	Average	(80-84)
4.	Below average	(70-79)
5.	Unsatisfactory	(0-69)

FLIGHT MANEUVERS

	Airline Transport Agent
1. Flight instruction (oral)	
2. Equipment examination (oral)	3
3. Pre-flight check	3
4. Taxiing, or sailing and docking	2
5. Run-up	3
6. Take-offs: Hooded	2
• • •	
10. Climbs and climbing turns	3
11. 720° steep turns	
12. Maneuvering at minimum speed (slow flight)	3
13. Stalls	3
• • •	
22. Landing technique	3
• • •	
26. Traffic control procredures	3
27. Steep turn (Instruments only)	3
• • •	
30. Use of radio equipment	2
31. Orientation	2
• • •	
34. Instrument approach procedures	3
• • •	
36. Use of directional radio	3
37. Radio descent and pull up	3
38. Engine(s) out procedure	3
39. Maneuvering with engine(s) out	2
40. Maneuvering for landing at weather minimums	3
Instrument Agent:	500-1
41. Take-off and landing with engine(s) failure	2
42. Emergencies	3
43.	
44. Smoothness and co-ordination	3
45. Judgment	3

ADDITIONAL MANEUVERS OR REMARKS:

ILS 3

Actual use of oxygen mask 3

Final grade (not an average): 80%

Registration number of aircraft used for flight test: N 452A Martin 404.

30 (Received Docket Section Apr 6 930 AM '56—
Civil Aeronautics Board)

31 BEFORE THE CIVIL AERONAUTICS BOARD
Washington, D. C.

* * (Caption—No. SR-2210) * * *

ANSWER

Comes Now the Respondent, Charles R. Hard, and without prejudice to, or waiver of his Motion to Dismiss the Complainant's Complaint which is filed simultaneously with this Answer, alleges Answer to the Complaint herein as follows:

1. Respondent admits the allegations of Paragraph 1, 2 and 3 of said Complaint.

2. Respondent admits the allegations contained in Paragraph 4 of said Complaint except the allegation that Eastern Air Lines Flight 156 departed from Evansville, Indiana at approximately 1441 EST, and as to this allegation Respondent demands strict proof.

3. Respondent admits the allegations contained in Paragraph 5 of said Complaint, except the allegation therein that EAL Flight 156 on arrival over the radio facility identified as Commercial Broadcast Station WVJS proceeded in the direction of Owensboro-Daviess County Airport, and as to this allegation Respondent demands
32 strict proof.

4. Respondent admits the allegations of Paragraph 6 of said Complaint except the allegation therein that EAL Flight 156 descended to an altitude of 100 feet above the terrain while on the downwind leg for the runway of intended landing, and as to this allegation Respondent demands strict proof.

5. Respondent denies the allegations of Paragraph 7 of said Complaint and demands strict proof thereof.

6. Respondent admits the allegations of Paragraph 8 of said Complaint; and Respondent states the facts to be that his failure to properly align the aircraft in flight for a normal landing on said runway, the aircraft's striking the ground short and to the right of Runway 5, and the resulting extensive damage to the aircraft, all resulted from factors outside the control of the Respondent and not reasonably foreseeable although at the time the Respondent was exercising the highest degree of care, caution and judgment for the safety of said flight.

7. Respondent denies the allegations of Paragraphs 9, 10, 11, 12, 13 and 14 of the Complaint and demands strict proof thereof.

8. Respondent admits the allegations of Paragraph 15 of said Complaint.

9. Respondent denies the allegations of Paragraph 16 of said Complaint and demands strict proof thereof.

Respondent denies that Complainant is entitled to the relief prayed in his Complaint or any relief whatsoever, and asks that the Complaint be dismissed.

Respectfully submitted,

/s/ F. Harold Bennett

F. Harold Bennett, Attorney for Charles R. Hard, Respondent

Dated at Chicago, Illinois
this day of April, 1956.

CERTIFICATE OF SERVICE

I Hereby Certify that a copy of the Respondent's Answer to Complainant's Complaint has been served upon the following parties, by mailing copies thereof, postage prepaid, in a properly addressed envelope:

Ned K. Zartman
Trial Attorney
Civil Aeronautics Administration
Washington, D. C.
H. G. Moorhead
Hearing Examiner
Civil Aeronautics Administration
Washington, D. C.

/s/ F. Harold Bennett
F. Harold Bennett

Dated at Chicago, Illinois
this 4th day of April, 1956.

34 Department of Commerce
CIVIL AERONAUTICS ADMINISTRATION
Washington 25

(Received Docket Section Ap 6 301 PM '56—
Civil Aeronautics Board)

Apr 6 1956

Mr. H. G. Moorhead
Hearing Examiner
Civil Aeronautics Board
Washington 25, D. C.

Dear Mr. Moorhead: Re: Lowen v. Hard
Docket No. SR-2210

We have received a copy of the respondent's Motion to Dismiss with attached memorandum and affidavit, which upon examination shows no grounds upon which the Examiner could dismiss the complaint consistent with the Board's past practices in air safety proceedings. It appears that whatever defensive material might be contained therein could be presented at a hearing on the merits. In order to avoid delay, we do not intend to file a formal reply to the Motion, unless the Examiner indicates such a reply is necessary for a disposal of the Motion.

In a confirmation of an inquiry by your office, Mr. Ora W. Young, Regional Administrator, Region One, Civil Aeronautics Administration, on April 3, 1956, by letter, a copy of which is attached, extended the emergency suspension of Captain Hard's Airline Transport Rating for an additional 30 days—that is until May 7, 1956.

Very truly yours,
/s/ Robert P. Boyle
Robert P. Boyle
General Counsel

Enclosure
cc: F. H. Bennett, ALPA
Captain Charles R. Hard

35 (Received Docket Section Apr 6 301 PM '56—
Civil Aeronautics Board)

CERTIFIED AIR MAIL—Return Receipt Requested

April 3, 1956

Mr. Charles R. Hard
West Springs
Illinois

Dear Mr. Hard:

You are hereby advised that the emergency suspension of your Airline Transport Rating, which became effective March 9, 1956 for a period of thirty days, is hereby extended for an additional period of thirty days—until May 7, 1956.

Sincerely yours,
Ora W. Young
Administrator

cc: W-60, G. White
NY-220—Mr. Woodward (4 copies)
Agent Rinebold

36

April 6, 1956

Mr. F. Harold Bennett
Air Line Pilots Association
55th Street and Cicero Avenue
Chicago 38, Illinois

Dear Mr. Bennett:

re: C. J. Lowen, Jr., vs.
Charles R. Hard,
Docket No. SR-2210

I have received your letter of April 4th regarding the above-identified proceeding. You request the extension of time which was implied in my letter of March 29th. You also agree that you are most anxious for an early determination but do not desire to be rushed into a hearing. You also present a motion to dismiss and request that it be certified to the Board before you are "forced into a trial under the present complaint."

This letter and my letter of March 29th extend your time for answer so that your submissions of April 4, 1956 are accepted as timely.

You have not developed the facts of your position regarding the hearing, so that I do not know what you regard as an acceptably early disposition as contrasted with a setting which you would regard as "rushing" you. The Act in Section 609 appears to contemplate dispositions as possible within 30 days after emergency suspension with no provision for a longer period than 60 days. This and the high rating of Airline Transport Pilot impel me to as prompt action as will be fair. Please inform me if a hearing in the week of April 23rd would prejudice you in any way as too soon.

Regarding your motion to dismiss, I enclose my ruling which denies it. However, you will not that you are not foreclosed from raising the grounds again for a defense

upon the merits if you continue your opinion concerning their ultimate validity.

If you prefer that the hearing be set at a place other than Chicago, please inform me to that effect. Otherwise, I will assume that a hearing at Chicago, Illinois, will be most convenient for both parties upon balancing of all factors involved.

Very truly yours,
/s/ H. G. Moorhead
H. G. Moorhead
Hearing Examiner

37 CIVIL AERONAUTICS BOARD
Washington, D. C.

• • (Caption—No. SR-2210) • •

ORDER DENYING MOTION

To Respondent Charles R. Hard,
F. Harold Bennett, Air Line Pilots Association,
55th Street and Cicero Avenue, Chicago 38, Illinois

Complainant C. J. Lowen, Jr., Administrator of Civil Aeronautics,

Robert P. Boyle, General Counsel,
Gerald F. White, Chief, Enforcement and Litigation,
Ned K. Zartman, Trial Attorney, Washington, D. C.

Respondent having by motion dated April 4, 1956, requested that the complaint herein be dismissed on the ground, first, that Respondent contrary to the complaint has demonstrated that he does not lack qualification to retain both his Airline Transport Rating and his Airman Certificate, and on the ground, second, that Respondent is being subjected to alternative request for revocation or suspension for lack of qualification while known to be qualified and thus, Respondent states, as a penalty rather than for remedial purposes; and

It appearing that the first ground of Respondent's motion is not a basis for a motion to dismiss but is rather appropriate for defense upon the merits, and that the second ground is inconsistent with the Board's safety enforcement proceeding practice since the earliest reported case as an objection to procedure and is an issue for trial upon the merits in substance; and

It appearing further that the questions of the motion should not be certified to the Board as Respondent has requested by letter, contingently, since intermediate certifications are not favored in safety enforcement practice nor specifically in this case consistent with the public's statutory interest in prompt disposition of proceedings which involve, as does the present, an emergency suspension of an airman certificate;

A ruling should issue whereby,

Respondent's motion to dismiss the complaint herein is denied.

/s/ H. G. Moorhead
H. G. Moorhead,
Hearing Examiner

Dated this 6th day
of April, 1956 at
Washington, D. C.

40 (Letterhead of Air Line Pilots Association)

(Received Docket Section Apr 23 1055 AM '56—
Civil Aeronautics Board)

April 19, 1956

Mr. N. Zartman,
Trial Attorney
Civil Aeronautics Administration
Washington 25, D. C.

Re: C. J. Lowen, Jr., Administrator
vs. C. R. Hard — CAB Docket
SR-2210

Dear Mr. Zartman:

By this letter we are confirming our understanding had with respect to the trial of the above case, which is to begin in Chicago on Thursday, April 26, 1956.

My understanding of the agreement is that the writer, as Attorney for Mr. Hard, will be able, without objection from you as Attorney for C. J. Lowen, Jr., Administrator, to introduce at the hearing the transcript of the testimony of any of the ground witnesses who testified at the Accident Investigation Hearing on March 22 and 23, 1956 in Owensboro. The same privilege is not extended to you as Attorney for the Administrator, that is to say, we have no agreement which will permit the Administrator to introduce any part of the transcript taken at the Accident Investigation Hearing above-mentioned, and if the Administrator desires to introduce any part of this transcript it may be over my objection.

If my understanding expressed above is in anywise incorrect I will expect a clarification without delay.

Yours very truly,
Air Line Pilots Association
F. Harold Bennett
Legal and Conciliation Department

FHB:jp
cc: C. N. Sayen, President, ALPA
H. G. Moorhead, CAA, Hearing Examiner

OPINION OF HEARING EXAMINER MOORHEAD DELIVERED ORALLY AT CLOSE OF HEARING ON APRIL 28, 1956

530 Examiner Moorhead: There are a number of conflicts in the testimony. I believe that a lot of them are not, individually, too material; such as the exact point where Respondent broke through after coming in from the broadcasting station WVJS. There was the thought that he came close to the north. He testified he turned about a mile north. There were two pilots, as I recall, who would not commit themselves to the statement that

they could make their right turn at the field or within a distance north of it but close to it. However the Chief Pilot, I believe, did say it could be safely conducted even if it were started at the field.

I believe, on the whole, that type of approach, as a type of approach, was not contrary to safety or the regulations, distinguishing the type from the execution.

After a great deal of thought about exactly how the approach was made, on the conflicting testimony and putting all the facts together, I am unable to get past the statement, contrary to interest, which Respondent made to Agent Rinebold that he was approximately a half mile out.

I think that it must necessarily be very difficult for a person to recall, some long-time after a very serious accident like that, exactly what all the de'ails were; and I do not believe there has been any conscious falsification. But as I put this together, it seems on the whole it was more likely that Respondent was not out to within approxi-
531 mately 900 feet of a mile, where the turn could have been made without question under the regulations; and, in accordance with the testimony of the experts called by Respondent when they approved the procedure as a whole.

As a type of approach, I do not think that it was wrong; as a question of execution, something went wrong, obviously, during the course of it. Now, the question is whether there is sufficient evidence to prove that this was contrary to the regulations and poor judgment. On this, I believe that Respondent has to be judged as of the time and place and cannot be completely second-guessed and judged completely on a basis of what happened. There certainly is no absolute liability for an accident. I do not believe that the complainant has taken that position, although it has been dramatized, so to speak, in that way by the defense.

Respondent made a very steep left bank. It was steeper than he intended to make, and he does not know how it got as steep as it did. There is some possibility of some gusts, although the air at the airport was calm. I believe it has to be remembered that thunder and lightning that were observed were to the southwest of the airport, and at this time, on the base leg, Respondent was just as close to that area as he came throughout the whole flight. There was no evidence to show that he cut short of what otherwise would have been the distance he would have gone to the southwest before turning, because of danger
532 of a thunder storm there, but there is the possibility that a finger of gust reaching out could have affected the aircraft, although I reject the possibility of horizontal air currents, as such. It would be merely a gusty type of turbulence which did not exist generally.

On the other hand, the case is very close. The testimony was consistent that in these approaches a lot is left to a pilot's judgment. That, unquestionably, has to be good judgment. I think there should be no question but what a pilot should be immediately revoked if he were pulling a grandstand type of approach, or if he swung an airplane through a heavy bank to the left, then a heavy bank to the right, and sets down with the wheels touching as soon as it rolls to a level position. I am convinced that Respondent was not doing that. The accident was close to a matter of inches. There was, apparently, a depth of four inches. Apparently with four or five inches, it would have been safe; and possibly with even two inches it would have made the distance. In the same way, the timing gets down to seconds; possibly, within a second. Respondent thought the 'plane had righted itself. Perhaps in another second it might have all right, too. He would have hit evenly, and even if he had hit off the runway, there possibly would not have been an accident.

I do not want to get into speculation. I am merely showing that the accident was the result of very close conditions.

533 If Respondent, in making a bank, had been thrown into a heavy bank for a reason beyond his control—for which I can only think of a air condition as being adequate and unusual; if it was such, it was unusual—then, there is a break in the train of causation which makes the troubles of the flight follow from the failure to make a wide enough separation on the approach.

I believe that there is such a serious question about the situation that Mr. Rinebold, in imposing the emergency suspension, cannot be criticized. In spite of the fact that judgment was approved in a test, I believe that this type of judgment which we are talking about—this judgment which is necessary in the holder of a certificate—is something that must be demonstrated over a period of time. A man must be able to meet emergencies as an airline pilot, and just one test is not enough; although, as I understand it, the examination system is predicated merely on the presumption that a man, having had the training he has and the experience he has, will not in the absence of mistake be deemed to be other than qualified upon that point. He is judged upon his behavior during the test, but it is against a background.

There is a possibility that Respondent may have caused a stall or a partial stall or a cross-controlled slip of the airplane a tiny bit, pulling it out of the last bank, unintentionally. However, I do not believe there is adequate evidence to say that he did. The evidence as a whole

534 impresses me as establishing a set of facts where there is doubt and necessity for action to protect the public interest; but there is no occasion for any punitive type of action. The situation as a whole is a marginal one. I think it can be said the Respondent should have been a

little farther out, a little more lateral margin from the runway, but to say that he was far enough off to have violated the Civil Air Regulations strikes me as a different question. I believe there is some margin. There is an area within which it cannot be said that violation is established by subsequent actions, without proof of an inability generally to handle that type of a situation and persevering in the piloting in spite of inability, or an improper attitude in some way.

The standard, as the complainant has stated, is the highest. Upon that question, we have the regulatory problem of an industry in that, for instance, in the sea navigation industry masters and pilots there are only given one chance to make a mistake—at least in practice. If something goes wrong, they may not lose their operating certificate, but for practical purposes in that industry they are out. It is my understanding they do not get a second chance. However, in aviation, there has not been that condition. There the Board has had some cases when there was a clear deficiency on the part of pilots, and yet a comparatively short period of suspension was imposed.

Turning to that angle of this case, since February 17 535 did not fly until February 29, and then again until March 3 and 4. So that there was that period of approximately 16 days when he was completely out of the air. Then, subsequent to that time, he has been operating only as a co-pilot.

I believe that to the extent that a suspension has any punitive bearing, that that should be regarded as adequate in this case. It is my own view of the law that suspension is remedial, although the punitive effect of them is recognized when occasion arises for such recognition. For instance, in this one the testimony of witnesses is compelling. I believe that a suspension for a number of days, for a term, cannot be regarded as remedial, when its remedial

aspect is its primary function; and I believe that is the history of the Board's practice, without any deviation at all in what the Board has actually done, although what the Board said could be interpreted differently in the case of Lee vs. Brubaker and Olson. Therefore, I would not think that the punitive elements of a suspension for a period of time would necessarily be ruled out because the complaint is drafted upon a remedial basis.

However, I find no need for the punitive continuation and therefore merely make my ground of decision clear by stating my view of the law and the Board's practice. I believe I have made it clear that I do not think the re-examination given by Mr. Feast was adequate to control on the matter of judgment. That had to be supplemented by further experience. However, after reaching that 536 conclusion, I go on in accepting the testimony of Captain Clifford. I believe that Respondent has, since then, shown that he does have judgment requisite for an airline captain. After all, he has had a record, against which there is an accident like this, where there is of course serious ground for suspension, but not—I do not believe—the necessary degree of proof that we have to have in taking away the man's Airline Transport Rating.

With regard to a point which has not been argued in this case, but which was otherwise raised, I believe that the Board does have the complete responsibility rather than the Administrator when a case is brought for revocation. Granted, if someone applies for a certificate, the Administrator does have a discretion; but when a case is brought for revocation, the terms of Section 609 of the Regulations place the responsibility flatly upon the Board, rather than the Administrator, the determination of whether or not there shall be revocation.

To make the point specific, I am unable to draw any inference against Respondent because the co-pilot was not

called by him. I believe that the point is not necessarily more probative against one party than the other, although of course he does work with the Respondent. On the other hand, I think it is a reasonable attitude that if the Respondent's testimony were not going to be believed, then probably such corroboration as the co-pilot would give would not be believed. It is a question of whether
537 the physical facts would overcome the direct evidence. I have found, to a modified extent, that that is the fact in each case.

I believe that the general nature of the case is well illustrated by this situation with respect to the stall. In the argument, complainant was willing to concede that the evidence was not conclusive with regard to the stall and that the experts from the Martin Company thought that there definitely could not be said there was a stall. On the other hand, there was the matter of buffeting that was, necessarily, inconsistent with the possibility of the accelerated stall; and the record, as a whole, strikes me as being very much in that type of a posture where one simply cannot be sure exactly what did happen and there is not a clear enough, well-marked line to say that Respondent did something wrong getting into this situation. I mean, it is so much a question of degree, of difficult judgment in there. There is a case made out for the protection of the public interest, but that has been taken care of. There is no case made out for anything further.

FORMAL FINDINGS:

Upon the Record Herein, the Examiner finds:

I.

That the Civil Aeronautics Board has jurisdiction in this proceeding under Section 609 of the Civil Aeronautics Act of 1938, as amended.

538

II.

That the Respondent is, and at all times material herein, has been the holder of Airman Certificate No. 45366-40 with an Airline Transport Rating, but that the said rating has been under emergency suspension since March 19, 1956.

III.

That, on February 17, 1956, Respondent in the employment of Eastern Air Lines, Inc., as pilot in command of a Martin 404 aircraft, Identification No. N-445A, piloted the said aircraft in scheduled air transportation as Flight 156, from Evansville, Indiana, at a departure time—which is not controlling—which is estimate-able as 1441 Eastern Standard Time, with a destination of Owensboro, Kentucky, on an approved Instrument Flight Plan, cruising at 2,000 feet, and arrived over Commercial Broadcast Station WVJS approximately 1.9 miles north of Owensboro-Daviess County Airport and with proper instrument procedures turned and made an instrument let down for the said County Airport breaking out of the 600 foot ceiling with reported one-mile visibility at approximately 550 feet altitude over the terrain which would be 407 feet at the airport, hence was approximately 960 feet mean sea level.

IV.

That Respondent took over the controls for piloting the said aircraft, Flight 156, approximately one mile north of said airport, whereafter he executed a right turn to
539 roughly parallel Runway 5 for a landing on that runway, in an approach which was proper in type, but questionable in execution, in that Respondent did not fly to a sufficient lateral distance within 900 feet of a mile from the said airport, but to a distance which he subsequently estimated as one-half mile of lateral separation, which distance, while it may have exceeded this estima-

tion, nevertheless required more than a 30-degree bank to complete the turn for alignment with Runway 5, considering the air speed of 120 knots on the downwind leg, reduced to 110 knots thereafter, and the weight and condition of the said aircraft, such operation being regarded as marginal and a difficult decision, which is within the requirements and an airline captain's exercise of judgment under conditions rendering the decision difficult.

V.

That to the southwest of the said airport were thunder storms, showers with thunder and lightning, whereas on the said airport there was a condition of fog allowing one mile official visibility and a three-mile an hour wind from the northeast.

VI.

That, as the result of an excessive left bank, which may have been caused by over control or some variety of stall, but also may have been caused by an air condition which was not to have been anticipated but nevertheless may
540 have been existing in that locality, Respondent in recovery added power and thereafter had a right bank of the said aircraft, with the result that Respondent overshot the point from which the perfect approach should have been started to Runway 5, and in the right bank failed by inches of distance and a second or less of time in completing the recovery to a point where no accident would have resulted; but that, in fact, the said aircraft struck the ground short and to the right of the runway, causing extensive damage to the said aircraft.

VII.

That the Respondent during the approach to the runway of intended landing operated the said aircraft in accordance with the proper plan, but in a marginal execution which resulted in there being no allowance of a mar-

gin for error, which has required his re-examination in the public interest with regard to his technical proficiency and skill for the holding of an Airline Transport Rating.

VIII.

That the landing of the said aircraft endangered the lives of passengers and crew aboard the said Flight 156 and the property of Eastern Air Lines, Inc.; but that it has not been proved that Respondent's attitude was in any way careless or reckless.

Mr. White: Attitude?

Examiner Moorhead: Attitude, Mr. White.

541 Parenthetically and aside, the carelessness and recklessness are terms of attitude, although there are situations in which the Board has held the finding of such things irrespective of attitude.

IX.

That Respondent on the said flight did not operate the said aircraft contrary to the provisions of Section 40.18(a) of the Civil Air Regulations, with recognition that any turn on to final may normally result in a certain amount of loss of altitude which this finding concludes is not prohibited by that regulation.

Examiner Moorhead: I will just ask you if you think the maneuvers are adequately covered already. Do you think it is covered?

Mr. White: I would appreciate the order at this time, if the Examiner please.

Examiner Moorhead: I was wondering if you thought there should be another finding added to that Paragraph 14 of the Complaint. I think it is probably already covered.

X.

That the public interest has required the testing of Respondent's capabilities, which has expired in time at this point; namely, a test of his judgment over a period of time, but that upon the record there appears to be no necessity for further action by the Board of either a remedial
542 or punitive nature, if punitive is to be regarded as separate and distinct from remedial.

ORDER

It Is Ordered:

That, subject to provisions for appeal, which are hereinafter stated, this proceeding be, and it hereby is, dismissed; effective May 7, 1956.

Mr. White: Is it the Examiner's intention that the effect of his order be to terminate the emergency suspension?

Examiner Moorhead: From a strictly legal point of view, of course, the decision cannot speak prior to its effective date.

If you are asking me as to whether I think it would be consistent with the public interest to terminate it sooner, I believe I would say yes.

Mr. White: Do you want to so order?

Examiner Moorhead: I cannot make my order effective any sooner than the allowance of the period for appeal would permit.

Mr. White: Your order can be effective, subject to being overturned if appeal is taken and an order changing the effectiveness of your order is entered by the Board.

Examiner Moorhead: As I see it, compliance prior to the effective date of the order has to be on a voluntary basis. If it is the pleasure of the parties, I would be glad—

Mr. White: Just to clarify the point, the Adminis-
543 trator ought to not be in position of having the Examiner say, "I think you ought to do this or that." You have the authority, under Section 609, at the hearing to determine whether suspension is in order or not.

Examiner Moorhead: This is my view: that my order cannot, in the nature of things, be effective until the effective date arrives unless by mutual consent the parties appeals are waived.

With that explanation, I will redraft the order.

Mr. White: Perhaps, if the Examiner wants to withdraw the observation that he does not think the emergency suspension, in the interest of the public is to continue—

Mr. Bennett: It seems to me that the order should probably be that the proceedings are dismissed, with the right of appeal as required by law. Then, the date of the order, of course, would terminate the emergency suspension.

Mr. White: Off the record, sir?

Examiner Moorhead: Off the record.

(Discussion off the record.)

Examiner Moorhead: On the record.

The only way I can see is to simply leave out "effective May 7."

It is ordered that these proceedings be and hereby are dismissed.

544 • • •

668 CIVIL AERONAUTICS BOARD
Washington

• • (Caption—Docket No. SR-2210) • •

ORDER OF CLARIFICATION.

The Hearing Examiner being advised that Respondent has requested Complainant to release the emergency sus-

pension which Complainant imposed on Respondent's airline transport rating on March 9, 1956, and that Complainant for compliance therewith desires clarification of the Initial Decision which was issued orally herein on April 28, 1956, so that the said decision cannot be interpreted to require that the said rating remain suspended until May 7, 1956; and

It appearing that the ruling of Complainant's request is within the intention of the said decision, which was to find that the said emergency suspension satisfied the public interest however soon terminated, but with findings and an order appropriate to recognition of the limitations of the hearing examiner's power, which would not permit him to order its termination prior to the earliest date upon which the said decision could become final as that of the Board, May 7, 1956; and therefore, it appearing that the said request for clarification may, and for the convenience of the parties, should be granted;

It Is Ordered, That the Initial Decision which was orally issued herein on April 28, 1956, be, and it hereby is clarified by addition and amendment thus to in-
669 clude a supplementary finding which reads as follows:

> "That the emergency suspension of Respondent's airline transport rating which was imposed March 9, 1956, has been required in the public interest but is no longer required as of the time of its release, whether such release occur at any time on or after this 28th day of April 1956, by discretionary action of the Administrator, or whether such release occur in compliance with the requirement of the order herein which will become effective as hereinafter provided on May 7, 1956."

It Is Further Ordered, That if there be any provision or provisions of the Initial Decision herein which are inconsistent herewith, they be, and hereby are amended to conform hereto.

Dated this 2nd day
of May, 1956, at
Washington, D. C.

/s/ H. G. Moorhead
H. G. Moorhead
Hearing Examiner

670 BEFORE THE CIVIL AERONAUTICS BOARD
Washington, D.C.

(Received Docket Section—May 3, 9:37 AM '56)

* *(Caption—Docket No. SR-2210) * *

NOTICE OF APPEAL.

Please Take Notice that the Complainant, C. J. Lowen, Jr., Administrator of Civil Aeronautics, by his attorneys, intends to appeal to the Civil Aeronautics Board, in accordance with Section 301.30 of the Board's Rules of Practice, the Initial Decision of the Examiner issued April 28, 1956 in the subject proceeding.

Dated: May 3, 1956.

/s/ Robert P. Boyle
Robert P. Boyle
General Counsel
Civil Aeronautics Administration

/s/ Ned K. Zartman
Ned K. Zartman
Trial Attorney
Civil Aeronautics Administration

CERTIFICATE OF SERVICE.

I hereby certify that a copy of this Notice of Appeal has been served upon the following by mailing, postage prepaid, a copy thereof in a properly addressed envelope to:

Captain Charles R. Hard
Western Springs, Illinois
Mr. F. Harold Bennett
Legal Department
Air Line Pilots Association
55th Street & Cicero Avenue
Chicago 38, Illinois

Dated: May 3, 1956.

/s/ Ned K. Zartman
Ned K. Zartman
Civil Aeronautics Administration

671 BEFORE THE CIVIL AERONAUTICS BOARD
Washington, D. C.

(Received Docket Section—May 9, 3:39 PM '56)

• • (Caption—Docket No. SR-2210) • •

NOTICE OF APPEAL.

Please Take Notice that the Respondent, Charles R. Hard, by his attorney, intends to appeal to the Civil Aeronautics Board, in accordance with Section 301.30 of the Board's Rules of Practice, the Initial Decision of the Examiner issued April 28, 1956 in the subject proceeding.

Dated: May 7, 1956.

/s/ F. Harold Bennett,
F. Harold Bennett, Attorney for
Respondent Charles R. Hard

CERTIFICATE OF SERVICE.

I hereby certify that a copy of this Notice of Appeal has been served upon the following by mailing, postage prepaid, a copy thereof in a properly addressed envelope to:

Robert P. Boyle
General Counsel
Civil Aeronautics Administration
Ned K. Zartman
Trial Attorney
Civil Aeronautics Administration
Washington, D. C.

Dated: May 7, 1956.

/s/ F. Harold Bennett,
F. Harold Bennett, Attorney for
Respondent Charles R. Hard

734 UNITED STATES OF AMERICA
CIVIL AERONAUTICS BOARD
Washington, D. C.

• • (Caption—Docket No. SR-2210) • •

Decided: February 6, 1957

Appearances:

Gerald F. White, Chief Litigation and Enforcement Division, Civil Aeronautics Administration.

Ned K. Zartman, Trial Attorney, Civil Aeronautics Administration.

F. Harold Bennett, Attorney, Air Line Pilots Association.

OPINION.

By The Board:

This proceeding arises out of a landing accident which occurred at the Owensboro, Kentucky, Airport on February 17, 1956. The aircraft, an Eastern Air Lines Martin 404 with 20 passengers on board, ended up on its back with the right wing torn off at the root and other

major damage, although no serious personal injury was reported. The aircraft was under the co mmand of the respondent herein, and his airline transport rating was placed under emergency suspension by the Administrator of Civil Aeronautics from March 9th until May 7th, 1956, during most of which period respondent continued flying for Eastern as a co-pilot.

The Administrator, by his complaint filed March 735 16, 1956, initiating the present proceeding, charges that respondent, in approaching for a landing at the Owensboro Airport, violated Sections 60.12 and 40.18(a) of the Civil Air Regulations[1] and demonstrated such a lack of care, skill, judgment and responsibility required of a holder of an airline transport pilot rating, as to require that such rating be revoked for lack of qualification, or failing such revocation that respondent's airman certificate be suspended. Respondent filed an answer denying the Administrator's charges and requesting that the complaint be dismissed.

After due notice a public hearing was held before Examiner H. G. Moorhead, who delivered his initial decision orally on the record.[2] In it he found, (a) that

[1] Section 60.12 prohibits operation of an aircraft in a careless and reckless manner endangering the lives and property of others. Section 40.18 requires observance of the operation specifications of the air carrier involved and Paragraph 32 of Eastern Air Lines' operations specifications interdicts an approach more than 50 feet below the minimum descent for landing specified in the applicable form ACA-511, in this case below 450 feet above field elevation unless the aircraft has arrived at a position from which a normal approach can be made to the runway of intended landing.

[2] The initial decision was supplemented by a written order of clarification dated May 2, 1956, pertaining only to the date of expiration of the emergency suspensions theretofore imposed upon respondent.

respondent's approach to the runway of intended landing was proper in type but "marginal" in execution, in that the lateral distance of respondent's downwind leg from such runway was not sufficient to allow a margin for error, but that in view of the adverse conditions prevailing, respondent's approach represented a difficult decision which was within the regulations and within the judgment which an airline captain may exercise; (b) that, "as the result of an excessive left bank, which may have been caused by over control or some variety of stall, but also may have been caused by an air condition which was not to have been anticipated but nevertheless may have been existing in that locality, respondent 736 in recovery added power and thereafter had a right bank of the said aircraft, with the result that respondent overshot the point from which the perfect approach should have been started to Runway 5, and in the right bank failed by inches of distance and a second or less of time in completing the recovery to a point where no accident would have resulted; but that, in fact, the said aircraft struck the ground short and to the right of the runway, causing extensive damage to the said aircraft"; (c) that, since on the record as a whole there is doubt as to precisely what occurred, there is not a clear enough line to say that respondent, in deciding a difficult question of degree acted culpably; no disciplinary action is called for, but if any such action were necessary, the emergency suspension already imposed upon respondent would be adequate for this purpose; (d) that the record does not contain the necessary degree of proof to revoke respondent's airline transport rating; (e) that the public interest requires that respondent be re-examined as to his technical proficiency, judgment and skill for the rating, but that it has not been shown that respondent's attitude was in any way careless or reck-

less; and (f) that a re-examination which respondent passed at the hands of an Aviation Safety Agent of the Administrator was not of itself controlling on the matter of judgment, for approval of judgment in one test is not enough to demonstrate judgment over a period of time; but that when this test is considered together with the testimony as to respondent's judgment by Captain Clifford, for whom respondent has since been flying as a co-pilot, together with respondent's own record as a pilot, there is no further need for testing respondent's qualifications as an airline captain, and that 737 accordingly, the proceeding should be terminated.

The Administrator appeals from the Examiner's failure to find that respondent violated the Civil Air Regulations, and urges that respondent's airline transport rating should be revoked. Respondent in turn appeals (a) from the Examiner's failure to dismiss the complaint as not sustained by material, probative and reliable evidence, (b) the finding that respondent's execution of the approach was questionable or marginal with respect to the lateral separation between the downwind leg and the runway, and (c) the failure to find that when respondent passed an examination by the Administrator's agent on all maneuvers and other requirements, including judgment, all justification for the allegation that respondent was unqualified disappeared.

The Administrator's contention at the hearing, here reiterated, is that the respondent operated the aircraft during the approach for landing in such an unsafe and improper manner as to demonstrate unfitness to hold an airline transport pilot rating. The respondent, on the other hand, testified to a flight path and maneuvers of aircraft which, as described by him, was a normal, customary type of approach except for its outcome. Much of the evidence submitted by the parties in support of

their respective positions is conflicting, and the issues on appeal largely turn on the resolution of the questions of fact so raised concerning events leading up to the accident.

It is undisputed that respondent, while nearing the end of a flight from Evansville, Ind., under instrument conditions, located himself over commercial broadcast station WVJS, which is about 1.9 miles north of the Owensboro Airport, and then proceeded southward to 738 the airport on a heading of 194 degrees magnetic, breaking out underneath the overcast north of the field. At this point, having sighted the field ahead, respondent elected to land on Runway 5 (which runs to the northeast), and soon thereafter—how soon is disputed—commenced a right turn to the southwest so as to enter the downwind leg for Runway 5. The heading of respondent's downwind leg was about 250 degrees, which, in the absence of any appreciable wind, produced a flight path diverging by about 20 degrees from Runway 5, and thus gradually increased the lateral separation of the aircraft from the runway during its progess along the downwind leg. There is a major dispute as to the distance of the aircraft from the runway when it reached a point on the downwind leg abeam the runway threshold, i.e., on a line passing through the beginning of the runway at right angles to the runway direction; such distance was about a half mile according to the Administrator and almost a mile according to respondent. Within 10 seconds or less after reaching this point, respondent terminated his downwind leg and commenced a descending "U" turn to the left in order to land on Runway 5. The left turn was completed but the aircraft struck the ground at a point 330 feet short of the runway and 125 feet to the right or south of its projected centerline. The maneuvers of the airplane during the approach are also in dispute.

According to the respondent's testimony, he broke out of the clouds about a mile from the airport and at an altitude of about 550 feet on his initial approach, he made a right turn, which was completed while still 1200-1400 feet to the north of the threshold of Runway 17, and established a downwind leg on a heading of 250 degrees. He proceeded until he was more than a mile abeam of the threshold of Runway 5 and 5-10 sec-739 onds later commenced a 30 degree bank and held it until within 45 degrees of the runway heading, at which point the bank unaccountably steepened. Respondent testified that he was at an altitude of 400-450 feet at this time. He stated that with the help of the co-pilot he raised the wings to a level position and applied power. After recovery he estimated that he was at 300 feet altitude. At this point, respondent claimed to be descending on a heading of 5 degrees to the left of Runway 5 and in a normal wing level position for a landing. However, 5 to 7 seconds later the right wing dropped without warning. Respondent attempted to raise the right wing and lift the nose. While still attempting to raise the wing, ground contact occurred.

The Administrator contends that respondent's testimony was contradicted "in each of its most significant aspects by at least two of the ground or passenger witnesses". Thus, while respondent asserts that he completed his turn onto the downwind leg outside of the airport (e.g., 1200-1400 feet north of the threshold of Runway 17) two ground witnesses (Kincaid and Ayer) placed the aircraft over the airport at the time the turn was made. Moreover, respondent admitted, against interest, to CAA Agent Rinehold that he "came over the end of the north Runway [17]" and then made a right turn "into his downwind leg paralleling Runway 5". Rinehold indicated that this maneuver would bring respondent to a distance of 1800-2000

feet when abreast of the threshold of Runway 5. Ayer and Kincaid testified, from their observation of the aircraft, that it appeared to be about 2000 feet (Ayer) and 2500 feet (Kincaid) abreast of Runway 5.

Respondent challenges the credibility of Ayer and Kincaid's testimony and offers the testimony of ground witness Cox as to the normalcy of respondent's course on the downwind leg.[3] Respondent's challenge is not to the integrity of the witnesses but as to their capacity for accurate observation under the prevalent circumstances. The Examiner did not deem it necessary to resolve the apparent conflict in the testimony of the ground witnesses because he construed respondent's statement to CAA Agent Rinehold with respect to his position at the time he inaugurated his turn on the downwind leg, and the extent of that turn as an admission that he was only about one-half mile from the threshold of Runway 5 when he started his left turn for the final approach.[4] We agree with the Examiner's construction of respondent's statement, which, incidentally, is consistent with the testimony of witnesses Ayer and Kincaid as to respondent's lateral separation from Runway 5 on his downwind leg.

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With respect to the left turn after the downwind leg, respondent testified that he set up a 30° left bank and

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[3] Cox was not questioned with respect to his estimation of the lateral distance of the downwind leg from Runway 5.

[4] The Examiner did not actually find precisely where respondent commenced the turn, although he rejected respondent's testimony at the hearing as to where he was at that time. The Examiner found, in part, that while respondent's lateral separation from the runway threshold may have been in excess of respondent's one-half mile estimate "it nevertheless required more than a 30-degree bank to complete the turn" (i.e. respondent was necessarily less than 3/4 mile from the runway threshold when he started the turn).

turned without substantial loss of altitude until 45° from the runway heading, at which point the left bank unaccountably steepened. After application of power and recovery to level flight, the aircraft was at 300 feet and needed but a 5° correction to the right to make a landing. After descending with wings level for about 5-7 seconds, the right wing unaccountably dropped steeply, and before recovery could be effected the crash occurred.

The Administrator contends that this testimony is contradicted by the passenger witnesses, as well as the 741 physical marks at the scene of the crash. Passengers Saxton and Schmidt testified (a) that the airplane lost altitude throughout the left turn, and that the bank steadily increased, (b) that while in the left turn the aircraft was so close to the ground as to cause worry about striking it, and (c) that there was no period of recovery from the left bank when the aircraft stayed in level flight and that it hit the ground within 3-5 seconds from the time that it was in the steepest part of the left bank.[5] Moreover, the physical evidence refutes respondent's testimony as to his heading after recovery from the left bank. Respondent testified that his heading at this time was within 5° of the centerline; moreover, from his testimony with respect to the subsequent right bank, it would be expected that his heading would have moved closer to that of the runway before ground contact occurred. But the physical evidence, even according to respondent's own witness, shows that the aircraft's actual heading at the time of ground contact was 20° to the left of the runway heading, indicating at least a 15° differential between respondent's testimony as to his heading prior to the right bank, and his heading after the right bank at the time of contact with the ground.

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[5] This testimony is buttressed by that of ground witness Kincaid who, in effect, indicated that the airplane went down out of his sight with its left wing still down.

Counsel for respondent attacks the credibility of the passenger witnesses generally, but with specific reference to but one statement of one such witness.[6] Counsel also attempts to attribute the conflict between respondent's 742 testimony as to the aircraft's position subsequent to the allegedly sudden left bank and the physical marks on the ground to the respondent's possible confusion in the moments of crisis. However, this explanation does not square with respondent's testimony that the alleged 5° heading occurred during what he says was a 5-7 second interval of normal flight—that is during a period in which there was no crisis in the cockpit and when he thought he would be able to make a normal landing.[7]

The Examiner made no attempt to resolve the conflict in testimony; he simply concluded that the record does not show that respondent was careless or reckless on the later portion of the approach. This conclusion was apparently based upon the Examiner's view that the approach plan was proper, but that the execution of the final approach was "marginal" but not so faulty as to warrant disciplinary action, or that possibly the aircraft's altitude was affected by vagrant wind gusts. The Administrator

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[6] Respondent argues that Saxton's testimony that when respondent applied power the aircraft's nose came up to over 30° over the horizon is impossible, and from this concludes that none of the passenger testimony is credible. However, Saxton's impression as to the degree of nose high altitude may be erroneous, but it is definitely not improbable that the aircraft's nose rose over the horizon. In fact, the physical evidence of ground contact, which shows no evidence of a nose wheel impression, is perfectly consistent with the witness's observation.

[7] The reference here to the 5-7 second interval is merely to show the conflict between the respondent's testimony and his counsel's attempt to rationalize respondent's statements. Our appraisal of the record would lead us to reject the occurrence of any such interval in the approach.

challenges the conclusion that the approach plan was proper.[8] The Administrator correctly contends that none of respondent's witnesses testified that the approach could have been, or should have been made as respondent
743 described it, "if the approach and turn on to the downwind leg had been made over the field." On the contrary, their testimony requires the conclusion that the approach should not have been made as respondent described it, if the approach and turn onto the downwind leg were made over the field. Thus, the Administrator argues that the Examiner's findings fail "to give proper weight to the necessary consequence of his own finding that the left turn was commenced with only a half mile lateral separation from Runway 5" and necessarily disregards the weight of the remaining evidence as to the occurrences subsequent to the downwind leg. The Administrator properly argues that the conflict in testimony between respondent and the Administrator's witness must be resolved, since if the aircraft was flown as described by respondent, then the accident was fortuitous and he is beyond criticism—but if flown as described by the passenger and ground witnesses, then respondent attempted to land the aircraft from a position in relation to the runway that required abnormal and unsafe maneuvers of that

[8] This conclusion of the Examiner's was apparently based upon his recollection of the testimony of Eastern's chief pilot, Hudson. Hudson did testify on direct examination that an approach to Runway 5 could still be properly made if the turn to the downwind leg were made over the field, but on cross-examination he indicated that such an approach would require a downwind leg of 270° whereas respondent's testimony was that his heading on the downwind leg was only 250°. To take a heading of 270°, respondent would have had to make a turn of about 80° into his downwind leg whereas he testified to a 60° turn.

aircraft to reach that runway.[9] The Administrator suggests that the aircraft was flown in an abnormally steep descending turn in which the pilot stubbornly persisted "until the aircraft was either stalled or flown into the ground".

Respondent argues that the invalidity of the Administrator's theory that respondent was responsible for the "sudden and abnormal depression of the left wing" is demonstrated by the fact that the Adminstrator does not attempt to explain the "sudden and abnormal depression of the right wing". However, respondent is incor-
744 rect in this regard, since the Administrator relies upon Agent Rinehold's testimony:—Rinehold stated "that the 30 degree bank [respondent] used in an attempt to come to the end of the runway, didn't bring him to the end of the runway, but brought him south of the extended center line. In order to come back to the runway it was necessary to steepen the turn, and to stop that turn it was necessary to bank to the right". Moreover, if the aircraft stalled, as the Administrator suggests as an additional possibility, it could account for the dropping of the right wing. We believe that respondent's attack on the Administrator's theory is not successfully mounted.

As previously noted, the Administrator also sought to show that the accident may have resulted from an accelerated stall caused by an excessive bank and increased engine power. Respondent seeks to discount this possibility, arguing that the Martin Company expert witness testified "that from a steep bank, with the addition of power, the aircraft will have a tendency to roll out and straighten up," and that any stall would be preceded by

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[9] The Administrator also challenges the pilot's judgment in attempting to land an aircraft on a wet short runway (3700') with an approach that called for a continuous turn until just short of the runway threshold.

buffeting, of which there is no evidence. However, the record shows that Rodney, the Martin witness, testified that "if the stall was started in a steep bank, it would roll . . . if it were a co-ordinated turn it would roll level and probably possibly roll on the other way". Moreover, at least one of the passenger witnesses testified as to buffeting during the later stages of the left turn. Consequently, there is adequate evidence in the record to support a hypothesis of an accelerated stall.[10]

745 Respondent claims, in support of his own appeal, that the Examiner improperly found respondent's execution of the approach to be "marginal". Respondent asserts that the accident can be explained as having occurred during a completely normal approach as a result of the depression of the left wing, and then the right wing by an unexpected current of air from a thunderstorm in the vicinity of the aircraft. While the Examiner did not find affirmatively that the accident was caused by such a wind gust, he did hypothesize that it may have been caused by such a gust. Respondent argues that the record shows that lightning was observed "in the immediate vicinity of the aircraft" and that thunder was heard at the same time; thus indicating that there was a thunderstorm in the vicinity, that currents of airs in and about a thunderstorm are "best described as chaotic"; that a thunderstorm may send out fingers of air currents of considerable velocity, "vertical and horizontal" which may never reach the ground; and that such a current of air may have caused the left wing of the aircraft to be "depressed suddenly", and may have simi-

[10] Respondent also testified to the fact that after the left wing dropped, he increased the power setting to 38-39 inches, which is cruise climb power, substantially in excess of normal approach power for a Martin 404. Use of such a power setting is also consistent with the accelerated stall theory.

larly later affected the right wing immediately prior to the crash.

However, we do not believe that respondent would escape responsibility, even if the wind gust theory were credible, since it seems clear from the physical evidence as to the aircraft's position and heading[11] at the time of the impact, that a reasonably prudent pilot would have realized in time to execute a missed approach procedure, that the aircraft was not in a position to make a safe landing.

746 Under the existing physical conditions, a safe landing on Runway 5 (3700′) in a Martin 404 at the probable landing weight[12] of respondent's aircraft (about 41,000 lbs.) would at best require an almost immediate touchdown at the approach end of the runway.[13] It is clear, however, from the aforementioned physical evidence that the aircraft had not been maneuvered into a position where such a touchdown could have been effected without the performance of acrobatic maneuvers. This fact should have become clear to respondent sufficiently prior to ground contact to have permitted him to effect a missed approach procedure. Consequently, it must be concluded that, re-

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[11] As previously noted, the aircraft's heading was 20° to the left of the projected centerline, and at the time of ground contact it was 330 feet short of the runway and 125 feet to the right of the projected centerline.

[12] Based upon the reported take-off weight of the aircraft 17 minutes earlier and assuming standard gasoline consumption.

[13] According to the CAA Approved Airplane Flight Manual for Eastern Air Lines' Martin 404, in order to properly dispatch an aircraft with an expected landing weight of 41,000 lbs. to a point at the elevation of the Owensboro Airport there would have to be a runway at least 3800′ in length. These calculations allow an approximate 40 percent safety margin over the absolute minimum landing distance assuming a standard approach and a dry runway. This margin is appreciably reduced where, as in the instant case, the runway is wet.

gardless of any possible wind gust explanation for the excessive left bank, the respondent should have executed a missed approach procedure upon recovery therefrom instead of persisting in his efforts to accomplish a landing and his failure to do so can only be described as careless.

But in any case, after careful scrutiny of the record, we believe that the wind gust theory, while not without some evidentiary support, should be rejected as a possible explanation of the cause of the accident. In order to give credence to the wind gust theory, it is necessary to accept respondent's statement that he was in a normal bank when the left wing was suddenly depressed and to reject the contrary testimony of the passenger witnesses heretofore referred to with respect to that bank (e.g. that 747 the bank gradually increased as the turn progressed).

Moreover, it is also necessary to reject the conclusion, which we have already indicated is sound, that respondent's downwind leg did not leave him with sufficient distance from the threshold of the runway for a normal approach, so that an abnormally steep bank was required to approach the runway. In short, acceptance of the wind gust theory requires that the bulk of the Administrator's evidence be discounted, if not completely disregarded. This, we believe, may not properly be done unless the record contained substantial evidence as to the possibility that wind gusts did affect the aircraft's altitude. But on this matter the record is most tenuous. In the first place, respondent himself testified that there had been no wind buffeting during the approach, and that he had not been aware of any lighting or thunderstorm in the aircraft's vicinity, which would be the normal thing had there actually been such a storm near there.[4] Further-

[4] Thunderstorms were not forecast for, or reported in the Owensboro area by weather observers or pilots at any time during the day of the accident. None of the passengers were questioned by the parties as to their observations as to weather during the approach.

more, the ground witnesses at the airport testified that it had been raining steadily without wind gusts or much wind of any kind all day, again conditions which are inconsistent with the probability of thunderstorms in the Owensboro area. As heretofore noted, the only evidence of a storm in the aircraft's vicinity comes from ground witnesses who testified to having seen lightning in the southwest and heard thunder at the moment the aircraft crashed. While the witnesses said that the lightning appeared to be in the aircraft's vicinity, one of them also pointed out that it appeared to be beyond the aircraft.

748 The record indicates that there were reported thunderstorms southwest of Owensboro in the direction from which the final approach was being made, and it is probable that the lightning observed came from such storms rather than from one in the near vicinity of Owensboro. It is an obvious optical illusion to juxtapose two objects in the same general direction which are observed at a distance even where there may have been considerable space between them. Finally, if it is assumed that there was no thunderstorm in the immediate vicinity of the aircraft, it is improbable that there could have occurred, under the reported weather conditions, any wind gusts of sufficient velocity of force to have affected the aircraft's attitude. Accordingly, we believe that the wind gust theory is without substantial support in the record, and is heavily outweighed by evidence to the contrary.

As the discussion heretofore indicates, the record viewed as a whole warrant acceptance of the Administrator's contention as to how the accident occurred. There remains the question of whether, rejecting the respondent's testimony and explanation of the causation of the accident, and accepting the Administrator's view, there has been demonstrated a course of action by the respondent which violates the standard of care to be properly expected of

an airline pilot, and is thereby "careless and reckless" within the meaning of Section 60.12 of the Civil Air Regulations. In this connection, attention is invited to Section 601(b) of the Act which specifically adjures the Board in carrying out its air safety responsibilities "to give full consideration to the duty resting upon air carriers to perform their services with the highest possible degree of safety in the public interest." The Board 749 has, consistent with this standard, insisted upon "the highest degree of care on the part of those who sit at the controls of the airliners that carry the traveling public."[15] It is our view that respondent's approach cannot be consistent with "the highest degree of care". The record necessarily requires the conclusion that respondent's willingness to accept risks to his own and his passengers' and crew's lives is at the very least properly described as careless [16] and violative of the requirements of Section 60.12 of the Civil Air Regulations.[17]

We turn now to the consideration of the proper sanction to be imposed. The Administrator contends that "only revocation of respondent's air transport rating is appropriate * * * a captain who flies his aircraft to destruction under the conditions established by the evidence in this record cannot be left with command authority if the public is to be protected." The Administrator argues that "the type of failure here portrayed cannot be offset by the accumulation of several thousand hours of time in an aircraft." The Administrator states that revocation of

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[15] E. g. *Stead et al., Airman Certificates*, 1 C.A.B. 74, 84-5 (1939).

[16] *Compare Kuhn, Airman Certificate*, 13 C.A.B. 139, 142, 143.

[17] Since the violation of Section 60.12 which we have found is sufficient to sustain the sanction we are ordering, we need not consider further whether respondent's actions violated the other provisions of the regulations as charged.

respondent's air transport rating would not exclude respondent from aviation or deprive him of his livelihood, since he can continue to fly as co-pilot, but it will "place in other hands the responsibility for the safety of passengers."

We agree with the Administrator that disciplinary 750 action is called for in this case, and that the Board could not, by failure to impose a sanction, tacitly condone a course of action which, even if no accident had resulted, would have brought an aircraft to within inches of disaster. On the other hand, we question whether respondent's conduct on this flight was so egregious as to require revocation in the public interest, when we consider his eleven year record as a captain for Eastern and over 8,000 hours of flying experience without a previous incident of this type, or any disciplinary action for violations of safety rules. This does not mean that a single violation by an experienced pilot cannot ever call for revocation of his rating, for in flagrant cases the Board has ordered revocation. But on the facts here involved, we believe that the carelessness shown is not so egregious as to point to the ultimate sanction of revocation. In our judgment, the accident itself, together with a substantial suspension of his airline transport rating, would provide a sufficient deterrent against respondent or other pilots taking similar risks with their passengers' lives.[18]

Accordingly, we find a six month suspension should be imposed upon respondent, that he should be given credit against such period for the 60 days for which his certificate has already been suspended by the Administrator's

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[18] In view of our decision to suspend rather than revoke respondent's certificate, respondent's contentions with respect to his requalification through re-examination are moot. Compare *Administrator* v. *Clark*, Order No. SA-735, dated May 10, 1956.

emergency action, and that he be required to take an
751 appropriate flight check given by the Administrator prior to again exercising the privileges of his airline transport rating.

An appropriate order will be entered.

Durfee, Chairman, Gurney, Denny and Minetti, Members of the Board, concurred in the above opinion.

752 UNITED STATES OF AMERICA
CIVIL AERONAUTICS BOARD
Washington, D. C.

* * (Caption—Docket No. SR-2210) * *

ORDER.

A full public hearing having been held in the above-entitled proceeding, and the Board, upon consideration of the record, having issued its opinion containing it findings, conclusions and decision, which is attached hereto and made a part hereof;

It Is Ordered:

1. That Respondent's appeal from the Intitial Decision be, and it hereby is denied;

2. That the Complainant's appeal from the Initial Decision be granted, and the Examiner's order of April 28, 1956, be and it hereby is vacated;

3. That Respondent's airline transport rating be, and it hereby is suspended for a period of four months, effective twenty days after the date of this order.

By the Civil Aeronauties Board:

/s/ M. C. Mulligan
M. C. Mulligan
Secretary

(Seal)

759 UNITED STATES OF AMERICA
CIVIL AERONAUTICS BOARD
Washington, D. C.

* * (Caption—Docket No. SR-2210) * *

ORDER.

On February 20, 1957, respondent in the above-entitled proceeding filed a motion requesting a stay of Order No. S-779, dated February 6, 1957, which ordered respondent's airline transport rating suspended for a four month period effective February 26, 1957. Respondent asserts that additional time is needed in order to determine whether it would be in his interest to file a petition for judicial review or for reconsideration or modification of the Board's decision.

Upon consideration of the matters submitted on behalf of respondent, the Board has determined to stay the suspension provision of its order for the period provided for filing of a petition for reconsideration under Rule 301.34 of the Board's Rules of Practice in Air Safety Proceedings.

Therefore, It Is Ordered:

1. That the suspension ordered by paragraph 3 of Order No. S-779, dated February 6, 1957, be and it is stayed until March 11, 1957; Provided, That if respondent shall timely file a petition requesting rehearing, reargument, reconsideration or modification pursuant to Rule 301.34 of the Board's Rules of Practice in Air Safety Proceedings, such suspension shall be stayed pending final disposition of the petition so filed;

2. That, except as hereinabove granted, the motion filed February 20, 1957, be and hereby is denied.

By the Civil Aernonautics Board:

/s/ M. C. Mulligan
M. C. Mulligan
Secretary

(Seal)

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Office Supreme Court, U.S.
FILED
JAN 20 1958
JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1957.

No. 734

CHARLES R. HARD,
Petitioner,

vs.

CIVIL AERONAUTICS BOARD,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957.

No. .....

CHARLES R. HARD,

Petitioner,

vs.

CIVIL AERONAUTICS BOARD,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Petitioner, Charles R. Hard, prays that a Writ of Certiorari issued to review the opinion and judgment of the United States Court of Appeals for the Seventh Circuit decided in the above-captioned case on October 8, 1957 by which that court affirmed an order entered by the Respondent suspending Petitioner's Airline Transport Pilot's Rating.

OPINIONS BELOW.

The Initial Decision of the Civil Aeronautics Board Hearing Examiner was issued (orally) on April 28, 1956. (R. 33.) The Order of the Respondent, Civil Aeronautics Board, was issued February 6, 1957. (R. 48.) These Decisions are not officially reported. They are in the Ap-

pendix for Petitioner printed for use of the Court below, which is filed herein as the transcript of the Record and referred to as "R". This Order was stayed by the Respondent Board on February 19, 1957. This Order was stayed by the Court of Appeals below pending determination for review by that Court on March 11, 1957. The judgment of the Court of Appeals was entered October 8, 1957. The opinion is at 248 F. 2d 761 and appended hereto (*infra* p. 25). The execution and a stay of mandate of the judgment was stayed pending review on certiorari by Justice Clark December 17, 1957.

JURISDICTION.

The judgment of the Court of Appeals was entered October 8, 1957 and is included in the record as transmitted to this Court. The basis of jurisdiction in the court below was Section 1006, Civil Aeronautics Act of 1938, 52 Stat. 973, 980; 49 U. S. C. A. 646. This Petition for a Writ of Certiorari is filed within the time prescribed in 28 U. S. C. Section 2101(c) as further extended to January 21, 1958 by order of this court dated December 20, 1957. The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1) and 49 U. S. C. 646(f).

QUESTIONS PRESENTED.

In a proceeding under Section 609 of the Civil Aeronautics Act of 1938 as amended, 52 Stat. 1011, 49 U. S. C. Sec. 559 (referred to herein as the Act), Respondent, Civil Aeronautics Board, issued an order suspending Petitioner's Airline Transport Pilot Rating Certificate for a period of six (6) months (allowing credit for the sixty (60) days which had already been served as a result of an earlier "emergency" suspension). There was no finding, nor was it contended, that Petitioner was in any way unqualified to

hold such rating. The six (6) months suspension having been ordered because the Respondent Board determined that disciplinary action was called for and the sanction was imposed to provide a sufficient deterrent against Petitioner and other pilots from violating Civil Air Regulations. The Court of Appeals affirmed the Respondent Board's order.

The questions presented are (1) whether under Section 609 of the Civil Aeronautics Act of 1938, Congress intended to empower the Board to suspend the airman certificate of a qualified pilot purely as a deterrent sanction for penal purposes, and (2) whether a long standing practice and custom of the Board is sufficient to justify the exercise of such penalty power under Section 609 of the Act, particularly when the Respondent Board had earlier issued its Accident Investigation Report on the same incident upon which the penalty is based, and (3) whether the Board can, under Section 609 of the Act, entertain an appeal couched in remedial terms when the pilot has been examined and found qualified and then after the Board has already considered the record of an *ex parte* proceeding based upon the same incident of the appeal, but without due process safeguards, enter a penal sanction which punishment exceeds in time loss the $1,000 per violation limit of Section 901 of the Act.

STATUTES AND REGULATIONS.

The pertinent provisions of the Civil Aeronautics Act of 1938 are Sections 2, 201(b), 301, 401(h), 601(b), 609, 901 and 903(b), together with Civil Air Regulations Sections 21.16, 21.24(d), 21.41, 21.42, 60.12, 40.301, 40.302; Part 301.1, 303.2, 303.13, 303.14, 303.22, all of which are set out in the Appendix hereto, so far as material here.

STATEMENT OF THE CASE.

On February 7, 1956 Petitioner Charles R. Hard, while captain-in-command of Eastern Air Lines Trip 156, a Martin 404 type passenger aircraft, engaged in air commerce between Evansville, Indiana and Owensboro, Kentucky was involved in a landing accident at Owensboro seriously damaging the aircraft but causing no personal injuries. He was immediately removed from flight status by his employer Eastern Air Lines and was subsequently physically examined and otherwise checked by them. On March 3 and March 4 Petitioner Hard passed the authorized proficiency examinations given by Eastern Air Lines Check Pilot W. B. Poe and Civil Aeronautics Administration Safety Agent Wm. E. Feast. Hard was then returned to flight status and on March 7 commanded a regularly scheduled Eastern Air Line trip to Charlotte, North Carolina from Chicago, Illinois. On March 8 the Administrator of Aeronautics (referred to herein as the Administrator, see Section 201(b) and 301 of the Act) alleging authority under the emergency clause of Section 609 of the Act, suspended Petitioner's Air Line Pilot Transport Rating (referred to herein and in the decision below as an A.T.R.) for thirty (30) days (thereafter renewing for an additional thirty (30) days) on the grounds (although Petitioner was not informed of these grounds until the 13th) that the Owensboro incident disclosed facts which revealed Petitioner lacked competency and judgment necessary of a holder of an A.T.R. On March 16, the Administrator alleging jurisdiction under Section 609 of the Act filed a Complaint[1] with the Civil Aeronautics Board requesting that Petitioner's A.T.R. be revoked or suspended for lack of qualification.

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1. The Act does not empower the Administrator to so file, but this has been the practice in most of these proceedings. (14 C. F. R. 301.1.)

Meanwhile, on March 22 and 23, the Board through its Bureau of Safety Investigation held an inquiry and public hearings regarding the Owensboro accident and took sworn testimony of the Petitioner and twenty-two other witnesses pursuant to statutory authority Section 702(a) of the Act. (Reorg. Plan No. IV 1940 52 Stat. 1012, 49 U. S. C. A. 581, 582, *infra* p. 35).

A Motion to Dismiss the Administrator's Complaint was filed on the grounds that the Administrator had misconceived his action and was seeking the suspension or revocation as a penalty and not for remedial purposes as the Petitioner was tested, fully examined by the Administrator and had successfully demonstrated that he did lack qualification to retain his A.T.R. This Motion was denied by a Board Hearing Examiner on the grounds that it constituted a defense. The Petitioner's Motion to Certify this question to the Board was denied and on April 26, the Examiner held a hearing on the merits. The Examiner concluded that the "emergency" suspension was in the public interest but found no violation of any rule, regulation, or statute and that the "emergency" suspension be terminated effective May 7 (the date which the second suspension period would have expired in any event). Petitioner again resumed his status as an airline pilot with Eastern Air Lines. The Administrator appealed[2] the Examiner's decision to the Board requesting that Respondent Hard's A.T.R. be revoked because of lack of qualification. The Petitioner herein opposed this appeal and requested that the Initial Decision of the Examiner be sustained and his findings with a single factual exception and conclusions be adopted. On July 10 the Civil Aeronautics Board released its Acci-

2. The Act does not empower the Administrator to appeal. This has also been a practice of the Board, but see *Lee* v. *C. A. B.*, 225 F. 950 (C. A. D. C. 1955) which held that the Administrator lacked standing to petition the Court of Appeals for review of a Board order.

dent Investigation Report on the March 22, 23 hearings and inquiry finding that the "*probable cause*" of the accident was due to an improper landing approach by the Petitioner. On February 6, 1957 the Civil Aeronautics Board issued the order herein reversing the Examiner finding Hard guilty of violating Civil Air Regulation 60.12 (App. p. 39) and suspending Petitioner's A.T.R. for six months but allowing credit for sixty (60) days which he had already been suspended as a result of the emergency action. This suspension was because the Board determined that disciplinary action was called for and the Board must impose a sanction by a substantial suspension of Hard's rating to provide a sufficient deterrent against Hard and other pilots from taking similar risks.

INTRODUCTION.*

This is a case of first impression and this petition is sought because the issues presented have a significant impact upon air commerce as well as raising important questions of administrative law.

The issue here is solely a question of statutory construction. The facts of this incident that were tried before the Respondent Civil Aeronautics Board were uncontested on appeal so that full emphasis and consideration could be given to the jurisdictional question which has significance to all holders of Civil Aeronautics Administration issued certificates.

The court below in a dramatic effort to avoid the clear punitive nature of the order herein has needlessly introduced a new concept of suspensions which it considered necessary for the protection of an undefined "gray zone". (Op. below, *infra* p. 28.) In so doing, it has missed the historic importance of a properly conducted flight examination, overlooked the congressional mandate resting the prime responsibility for the highest possible degree of air safety upon the air carriers, and failed to recognize that a suspension order for deterrent purposes has been declared punitive, not only by the courts but by the Respondent Board itself.

We are aware of neither statute nor case authority which condones punitive power in an administrative agency unless the language of the endowing statute expressly authorizes it, a fact that is emphasized by the scarcity of cited cases in the decision below and its related case, *Wilson* v. *Civil Aeronautics Board*, 244 F. 2d 773 (C. A. D. C., 1957) Cert. denied 78 S. Ct. 119, November 12, 1957, which termed a Board suspension order a "disciplinary action."

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* All italics herein are the author's unless otherwise indicated.

REASONS RELIED UPON FOR THE WRIT OF CERTIORARI.

I.

THE COURT OF APPEALS BELOW HAS DECIDED A FEDERAL QUESTION IN A WAY IN CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT.

A. The Suspension Order Is Penal.

Neither the Civil Aeronautics Board Hearing Examiner nor the Respondent itself found Petitioner unqualified in any respect nor considered grounding him as necessary in order to protect the public. The Board by "making an example of Hard in order to deter him and other air line pilots from jeopardizing the safety of travelers by air" (Op. below, *infra* p. 27) concluded that a six-month disciplinary suspension was necessary. The phrases "sufficient deterrent," "disciplinary action," "sanction" and "ultimate sanction," were employed by the Board to describe its action. (R. 64.) The cases are clear that an order with this purpose renders the action penal. *Cummings* v. *Missouri*, 4 Wall. 277, 322; *Huntington* v. *Attrill*, 146 U. S. 657, 668; *Helwig* v. *U. S.*, 188 U. S. 605, 611; *Porter* v. *Montgomery*, 163 F. 2d 211, 215 (C. A. 3); *Heitmuller* v. *Berkow*, 165 F. 2d 961, 963, 964 (C. A. D. C.); *Lee* v. *C. A. B.*, 225 F. 2d 950, 953, in which Judge Prettyman, in discussing a complaint similar to the one herein, observed that "Any reading of the complaint shows the action prayed is purely punitive." In this respect the complaints in the two cases are identical.

B. Penal Powers Cannot Be Implied.

It has long been held that a punitive power cannot be implied from general remedial terms of a statute. *Tiffany* v. *National Bank of Missouri*, 18 Wall. 409, 410; *U. S.* v. *Two Hundred Barrels of Whiskey*, 95 U. S. 571, 575, 576; *Keppel* v. *Tiffin Savings Bank*, 197 U. S. 356, 362, 373; *Campbell* v. *Galeno*, 281 U. S. 599; *Wallace* v. *Cutten*, 298 U. S. 229, 237.

1. Administrative Practice.

The Respondent Board urged below (Op. below, *infra* p. 31) that an administrative practice whereby it had "suspended more than 4,000 airmen for violations of rules and without finding that they lacked competence or qualification to fly"[1] should have great weight in statutory interpretation.

Although the precise rule as to the effect of "long" continued administrative practice is something less than clear (see 73 L. Ed. 322; 84 L. Ed. 28), it is certain that to be given any effect at all it must have been a ruling which can reasonably be held to have decided the point in issue. *Estate of Sanford* v. *Commissioner of Internal Revenue*, 308 U. S. 39; *Anderson* v. *McKay*, 211 F. 2d 798, 805 (C. A. D. C.); *Order of Railway Conductors* v. *Swan*, 152 F. 2d 325, 329 aff'd. 329 U. S. 520; *F. W.*

1. Incidentally, we have been unable to locate this plethora of 4000 cases. The printed reports of the Board (5 and 13 C. A. B. Reports) do not remotely approach this figure. Inasmuch as the Respondent Board has this information peculiarly within its own knowledge, we suggest it would be helpful to know in how many of these cases the violating pilots were represented by counsel and how many involved an airline transport pilot rating of a scheduled airline pilot (where certainly the public interest must loom considerably higher than a student flying after school from a neighboring filling lot), in how many the issue of penal jurisdiction was raised and argued to the Board and in how many the suspension order caused a loss in excess of $1000 per violation.

Woolworth Company v. *United States*, 91 F. 2d 973, 976. It was not until very recently that the Respondent Board *for the first time* specifically held that a complaint alleging that the pilot "had operated the aircraft in a careless manner so as to endanger the life and property of others" in violation of certain Civil Air Regulations (14 C. F. R. 60.12 *infra* p. 39) was punitive, stating:

> "We are inclined to the view, and hold, that suspensions imposed *merely to prevent and deter* violations, and where *requalification* in one or more respects is not involved *are punitive* in the constitutional sense, and are a type of '*penalty*' from which immunity is provided by Section 1004(i)." Brubaker and Olsen, CAB Dockets SR-2168, 2169, August 2, 1954.

Recently, this Court in *United States* v. *E. I. DuPont de Nemours and Co.*, 353 U. S. 586, 590, rejected an argument that a 35-year administrative practice by the Federal Trade Commission would be persuasive as to the intent of Congress observing that as the question was being decided by it *for the first time* the Court had the duty to reconcile administrative interpretations with policies laid down by Congress.

If the interpretation of the statute does not impose the results of any specialized departmental knowledge or experience, administrative practice will not be preserved upon the courts. *Hagger Co.* v. *Helvering*, 308 U. S. 389, 398; *Social Security Board* v. *Nierotko*, 327 U. S. 358, 369.

We conclude, therefore, that penal power cannot be created by Respondent's administrative practice.

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2. The Public Interest.

Nor can punishment authority be implied under the "public interest" provision of the Act for in *American Airlines* v. *North American*, 351 U. S. 79, this Court in

treating with the phrase "the interest of the public" under Section 411 (49 U. S. C. 491) of the Act stated at 85:

> "*The Section is not concerned with punishment of wrongdoing* or protection of injured competitors but rather with protection of the *public interest.*" (Italics supplied.)

To the same effect is *United Air Lines* v. *C. A. B.*, 198 F. 2d 100, 105 (C. A. 7).

3. Administrative Discretion.

The penal power can hardly stem from what is often termed an administrative agency's broad discretionary powers. We are aware of no authority which gives a government administrative official discretionary power to penalize without specifically so stating in the enabling statute.[1] In any event, the exercise of discretionary authority does not permit errors of law. *McGrath* v. *Kristensen*, 340 U. S. 162.

4. Specific Remedial Finding Is, in any event, Necessary.

We submit that such error of law exists for in *L. P. Steuart & Bro.* v. *Bowles*, 322 U. S. 398, this Court held that such penal power will not be implied stating at 404:

> "We agree that it is for Congress to prescribe the penalties for the laws which it writes. It would transcend both the judicial and the administrative function to make additions to those which Congress has placed behind a statute. (Citing cases.) Hence we would have no difficulty in agreeing with petitioner's contention if the issue were whether a suspension order could

1. Note that the draftsmen of the Act granted discretionary power by the simple expedient of so stating, e. g. Sec. 602(b) of the Act, "Provided, That the Authority (Board) may, *in its discretion*, prohibit or restrict the issuance of airman certificates to aliens, or may make such issuance dependent on the terms of reciprocal agreements entered into with foreign governments."

be used as a means of punishment of an offender. But that statement of the question is a distortion of the issue presented on this record."

The Court did sustain the suspension order, which prevented an oil distributor from obtaining his share of wartime rationed oil, *upon the specific remedial finding* that it furthered the equitable allocation of oil as required by the statute.

We suggest that the court below in making the statement (Op. below, *infra* p. 28.) "* * * (W)hether the Board's order has salutary effect is beside the mark for all the agency can do is strive for protection of the public travelling by aircraft" overlooks the *air carrier's* prime responsibility in the safety field (Section 2b, Section 601b of the Act), and ignores requirement of *Steuart, supra,* as well as the philosophy underlying administrative agencies, that the expert body must *make a specific finding* demonstrating that its order is remedial and in fact regulates "air commerce in such manner as to best promote its development." (Section 2(e) of the Act.)

Capt. Hard is a senior airline pilot, 44, who two years ago, had over 10,000 hours or some 185,000 miles including about 1,443 instrument hours in the air without incident or reprimand of any sort whatsoever.

It may well be considered that "making an example of Hard" by levelling a "substantial suspension" because he "took a risk" with not only his own life but with those of fellow "crew members" and "his passengers" might have an effect on his brother pilots other than deterrence. For it is these men who are asked every hour of the day and in every corner of the globe to shoulder public safety in an air age rapidly becoming ever more complex[1] with faster and more powerful planes flown through congested

1. See comments of the Director of the Board's Bureau of Safety in 22 F. R. 9079 (Nov. 14, 1957).

airways and on to airports that were built at a time when today's norm would have been considered boldly experimental. Safety is with these men. This is hardly the time to cultivate a blind spot to administrative optics for that will only result in a *carte blanche* authority to hinge all blame and sanction upon the individual air man. Salutary effect is not beside the mark. It is the basic issue.

The suspension order cannot be termed non-penal by concluding that a "substantial suspension" for deterrent purposes will best protect the public, when there is a similar, if not, greater deterrence in a civil penalty imposed after a judicial hearing with the right to a trial by jury as contemplated by Sections 901 and 903 of the Act. (*Cf.* 401(h) of the Act.) Deterrence cannot be the jurisdictional divider. For in a deterrence sanction the remedial effects, if any,[1] flow from the imposition of the punishment (*Helwig* v. *U. S.*, 188 U. S. 605, 611) whereas punishment involved in a truly remedial order (*i. e.*, one which is used to correct an existing deficiency) is purely incidental. This long standing distinction has been overlooked by the court below.

Moreover, the grounding of an experienced airman for any period whatsoever will tend to make him less qualified—at least temporarily for flying in scheduled air commerce is a profession whose skills must be constantly exercised in order to maintain the highest degree of skill possible. This fact is well recognized by the Board in its own regulations which in several instances require *recent* flying experience in order to obtain and maintain an airline transport pilot rating. (14 C. F. R. 21.16, 21.41, 21.42, 40.301, 40.302, *infra* pp. 37, 38.) These are, of course, very minimum requirements; the air carriers are free to increase them and often do. In fact the Respondent has recently inaugurated hearings to increase this amount. See 22 Federal Register 9079 (Nov. 14, 1957.)

1. We assume *arguendo* that such deterrence is necessary in order to require pilots to fly safely.

The Board's order herein (R. 65) provided for an appropriate flight check to be given by the Administrator after the serving of the suspension penalty. Under the regulations (14 C. F. R. 40.302(b)) Petitioner would normally be due for such check anyhow, but this inclusion by the Board is significant for it emphasizes the necessity of recent flying time in order to maintain proficiency. The fairness is something else again, after a substantial lay off a pilot might well have difficulty regaining his touch. Furthermore, to ground an experienced pilot not only renders him less qualified but necessarily means a less experienced pilot must take his place. Highly trained pilots are presently in short supply[2] and this at a stage in which air commerce is constantly expanding.

The significance of all this is simply that in this heedless expediency to usurp penal power for the Board, air commerce is being hindered rather than developed. It is, therefore, of special importance that this court accept this case in order to correct the Board's statutory deviation.

C. If a Penal Power Is Implied It Runs Afoul of Due Process.

Consideration by tribunal of information which has not been formally introduced as evidence and subject to cross-examination and particularly an *ex parte* and informal exploration by those in charge, deprives the accused of due process. *I. C. C.* v. *Louisville & Nashville Ry. Co.*, 227 U. S. 88; *Kwock Jan Fat* v. *White*, 253 U. S. 455; *U. S.* v. *Abilene Ry.*, 265 U. S. 294; *Norwegian Nitrogen Products Co.* v. *U. S.*, 288 U. S. 294; *Reilly* v. *Pinkus*, 338 U. S. 269, 275; *Re Aughenbaugh*, 125 F. 2d 887 (C. A. 3); *Alexiou* v. *McGrath* (D. C. D. C.), 101 F. Supp. 421.

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2. See Clark "Airlines Face First Major Pilot Shortage" Aviation Week Jan. 16, 1956. "The Airlines Flight from Reality," Fortune Magazine Feb. 1956 p. 91.

In *United States ex rel. Accardi* v. *Shaughnessy*, 347 U. S. 260, this Court held that the Petitioner's allegation of prejudgment by the Board of Immigration Appeals—a Board subordinate to the Attorney General—because of the latter's public distribution of a list announcing his intention to deport certain "unsavory characters", including Accardi, would require an independent hearing in the District Court on such issue. Justice Clark stated at 268:

> "If petitioner can prove the allegation he should receive a new hearing before the Board without the burden of the previous proscription by the list. After the recall or cancellation of the list, the Board must rule out any consideration thereof and, in arriving at its decision, exercise its own independent discretion, after a fair hearing, which is nothing more than what the Regulations accord the petitioner as a right."

On May 22 and 23, 1956, the Respondent Board, pursuant to its statutory authority[1] conducted public hearings before a Civil Aeronautics Board Hearing Officer, Thomas K. McDill and a panel of two other Board Officials in a proceeding entitled "*In the Matter of: An Accident Involving an Aircraft of U. S. Registry N445A, Eastern Airlines, Inc., Martin 404, which occurred at Owensboro, Kentucky on February 17, 1956.*" Some twenty-three witnesses, including Petitioner, were examined under oath. The normal rules of evidence such as objections and the right to cross-examine are not part of this procedure. (See 14 C. F. R. 303.10, 303.13, 303.14, *infra* p. 39 and note that Sections 4, 5, 7, 8 and 10 of the Administrative Procedures Act are expressly inapplicable.)

On July 5, 1956, the Respondent Board adopted the "Ac-

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1. The Board has a statutory duty to "Investigate such accidents and report the facts, conditions and circumstances relating to each accident and the probable cause thereof." (Reorg. Plan No. IV 52 Stat. 1012 1940, Section 702(a) (2), Civil Aeronautics Act 49 U. S. C. A. 581, 582(a).) *infra* p. 35.

cident Investigation Report" which determined the *"probable cause"* of the Owensboro accident:

> "The Board determines that the probable cause of this accident was an improperly executed final approach, (by the pilot) resulting in a stall, during a steep, left turn at an altitude too low to permit recovery."

This report was publicly released on July 12, 1956, while the Initial Decision herein of Board Hearing Examiner, H. G. Moorhead, which imposed no sanction and found no violations on the part of Petitioner Hard, was pending upon appeal and a decision was being awaited by the Board. The finding was never recalled, cancelled, or overruled and, therefore, remained as a Board precedent. And the precedent resulting from the *ex parte* proceeding of the Accident Investigation Inquiry controlled—for the Board's final order on the appeal was adverse to Petitioner to the tune of a six month suspension.

This is a serious penalty action which can deprive the pilot of his professional rank for a time, if not forever.[1] If fair administration of justice requires an opportunity for the accused in a penalty proceeding to have his rights determined by a tribunal which had not already made up its mind based upon information dehors the record and not obtained through due process channels, then we should be able to safely assume that the Board's penalty procedure would not receive this Court's blessing. Due process demands more. *Cf. Bridges* v. *Wixon*, 326 U. S. 135, 154. And see *Lockwood* v. *District of Columbia*, 24 App. D. C. 569 (1905), to the effect that statutes imposing restrictions upon occupations are to be construed strictly. *Cf. Dent* v. *W. Virginia*, 129 U. S. 114; *Schware* v. *Board of Bar Examiners*, 353 U. S. 232, fn. 5, p. 239.

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1. There is no limit to the sanctions possible under Section 609, a fact that is embraced by 14 C. F. R. 21-24(d) (*infra* p. 37) which authorizes revocation as legitimate sanction.

Even had Congress specifically authorized this undertaking, it would run contrary to the holding of *Accardi* v. *Shaughnessy*, 347 U. S. 260, *supra*; for this Court remanded that case to the District Court for an independent hearing on the allegation of pre-judgment. Now the obstacles in proving pre-judgment by the Respondent Board are really insurmountable and the entanglement becomes apparent when we realize there is no appropriate forum to independently determine this issue. A proper hearing would of necessity require examination under oath of the members of the Board who issued the order. (*Shaughnessy* v. *Accardi*, 349 U. S. 280, 283.) This could hardly be accomplished before the Board itself.

Federal Trade Commission v. *Cement Institute*, 333 U. S. 683 (Op. below *infra* p. 32) does not adequately offset this claim of prejudgment as that case was not a penalty proceeding. And in contrast to the *Cement* case, congressional purpose here would be fulfilled by reversing the decision below as Congress placed the remedial, investigative and economic functions in the Board and avoided any possible infractions of due process by specifically providing that penalties for violations be processed in the District Courts (Section 901, 903 of the Act.)

The decision below has special and important impact on every airline pilot in the country for he is now in a quandary as to whether he is in jeopardy of having the C. A. B. Accident Investigation Hearing[1] ultimately influencing the Board to prejudge his case before it can hear any penalty proceeding. It is Petitioner's position that this is precisely what happened in this case.

Further, as a practical result of the decision below, any holder of a certificate issued by the Civil Aeronautics

1. The pilots themselves are, of course, desirous of having *all* facts brought forth, that might prevent recurrence of an accident or incident and are, therefore, prone to cooperate to the fullest extent.

Administration becomes dependent upon the whim of the Administrator for a statutory right to a trial by jury. The certificate holder has been afforded a statutory right to a jury trial, which is no longer his to demand. Naturally, any seeming curtailment of a right to a jury trial should be severely scrutinized. *Dimick* v. *Schiedt*, 293 U. S. 474; *District of Columbia* v. *Colts*, 282 U. S. 63. It should be noted here that when civil penalties are sought by the Administrator under Section 901, they stem from the same type of alleged violation incidents that are tried before the Board. There is no discernible rule, reason or standard—written or otherwise—which is determinative of whether a penalty complaint for violation of Civil Air Regulations is processed at home with the Board or in the appropriate District Court. As to any particular would-be violator, then, the jurisdictional classification affirmed below is unreasonable and arbitrary in depriving a jury trial in a violation proceeding. We submit that this fact alone should warrant consideration of this case by this Court.

D. Analogous Statutes Rebut the Assumption of Penal Power.

It is appropriate to examine other statutes in related fields of Government activity in order to dispel any doubts as to legislative intention and construction. See *Boston Sand Company* v. *U. S.*, 278 U. S. 41; *United States* v. *C. I. O.*, 335 U. S. 106.

The most analogous law is that regulating the Merchant Marine and it will be noted that the language empowering the Coast Guard Commandant to suspend or revoke certificates for violations is unequivocally clear. It states that if the Commandant of the Coast Guard shall find that a certificate holder is "incompetent or has been guilty of misbehavior, negligence or unskillfulness, or has

endangered a life, or has willfully violated any of the provisions of title 52 of the Revised Statutes or any of the regulations issued thereunder, * * * he shall suspend or revoke the license * * * of such officer or holder of such certificate * * *" R. S. 4450; March 3, 1911, c. 231, or Sec. 291, 36 Stat. 1167, as amended May 27, 1936, 49 Stat. 1381; 46 U. S. C. A. 239 (g).

The section pertaining to sea captains, who certainly are akin to airline captains, reads:

> "Licenses of captains * * * such license shall be suspended or revoked upon satisfactory proof of bad conduct, intemperate habits, incapacity, inattention to his duties, or the willful violation of any provision of this chapter * * * applicable to him." 46 U. S. C. A. 226.

Likewise, the Communications Act of 1934 empowers the Federal Communications Commission to affirm, modify, suspend, or revoke certificates in issue after notice of hearing and the statute specifically enumerates a detailed description of violations such as "violating any Act, treaty or conviction, * * * willfully damaging radio apparatus, transmitting false or deceptive signals, * * * etc." 47 U. S. C. A. 303(m). See also, the Securities Exchange Act of 1934, 15 U. S. C. 78s, 48 Stat. 898, and the Interstate Commerce Act, Part II, Sec. 212, 49 U. S. C. A. 312, 49 Stat. 555, which specifically allow suspension where a licensee has willfully failed to comply with the Act or regulations.

Incidentally, the principle of construing penal statutes strictly has also been overlooked by the Court below. *Campbell* v. *Galeno*, 281 U. S. 599; *Bulger* v. *Benson*, 262 Fed. 929 (C. A. 9, 1920). The latter case, involving marine pilots, is identical on principle with this one and not unnaturally provokes the thought that flying is to be treated as a special phenomenon best avoided.

II.

THE DECISION OF THE COURT OF APPEALS BELOW AS RENDERED IS IN CONFLICT WITH THE DECISION OF THE COURT OF APPEALS FOR THE NINTH CIRCUIT ON THE SAME MATTER.

The court below resorted to a rather unusual device in rejecting Petitioner's contention that the order herein was purely punitive stating (*infra* p. 28): "What Hard contends for would drive the Board into an area of sharp black and white, leaving the gray zone unprotected when, in the exercise of its discretion, a qualified airline pilot's behavior merits suspension rather than revocation of rating." This "gray zone" introduces a third concept into what formerly was a simple remedial-penal dichotomy of suspension orders properly divisible and adequately protecting the public with the use of an authorized examination. This new conception which ignores the effect and importance of such duly authorized examination has wider implications than may appear at first blush.

First, it creates a conflict within the circuits, for here Petitioner Hard was given a flight examination by his Company (Eastern Air Lines) Check Pilot and by the Civil Aeronautics Administration Safety Agent, William E. Feast, and found qualified in all respects including judgment. (R. 24-25.)

Brown v. *Civil Aeronautics Authority*, 112 F. 2nd 737 Op. Suppl. 119 F. 2d 172 involved an order by the Civil Aeronautics Authority (the title by which the Board was then known) which suspended Brown's pilot certificate for sixty days "and thereafter until he shall have demonstrated through a written examination that he is thoroughly familiar with the pertinent Civil Air Regulations and local traffic rules." The Authority had earlier found that Pilot Brown had violated certain traffic regulations, and misused an experimental aircraft and that these violations rendered him a potential hazard to the flying public. *Brown, Airman Certif.*, 1 CAB 666, 669.

The Ninth Circuit denied Petitioner's request for a supersedeas without prejudice, until after the Petitioner had offered to take the required examination or, unless the Authority declined to examine Petitioner within five days, stating at 112 F. 2d 737 "*if the suspension for sixty days was purely punitive* the application might be granted but the order also requires a written examination to ascertain whether or not Petitioner should be allowed to fly at all. We cannot make an order to jeopardize the safety of the public. For that reason, it is clear that the Petitioner shall *take the proposed examination before his right to fly is restored.*" Petitioner then took and passed the required examinations and his renewed petition for supersedeas was granted. (*Brown* v. *C. A. A.*, 119 F. 2d 172, 173.)

Although the case then became moot, it is clear authority for the proposition that once pilots' qualifications to fly had been determined by a duly conducted examination then the suspension order was "purely punitive". The cases are in clear conflict on this crucial issue.

Second, the holding below has special and important significance to all holders of Civil Aeronautic Administration issued airmen certificates inasmuch as apparently the regular examination given by the government Safety Agents and the air carrier check pilots is no longer sufficient to determine whether or not they are qualified to fly. If, as the decision below states, this is a "gray zone" then several thousand of pilots flying in air commerce who take periodic examinations, now have a judicially imposed legal doubt as to whether they are actually qualified to fly or whether they are in the midst of this strange undefined "gray zone". If these examinations cannot determine their designed purpose, then there is little gain and much time and money lost by requiring them.

Third, of even greater concern, to each certificate holder, is the open invitation to administrative mischief. There

is no explicit penalty criterion in 609 (presumably there must be a relationship to aeronautics, but aeronautical certificates should present no obstacle here) and if the examination has no meaningful effect than the authorities are free to suspend or revoke, without regard to demonstrated qualification and without the hindrance of a defined limitation (*e. g.* Section 901 has a limitation of $1,000 for each violation). In other words, the sky is the limit. See *Connally* v. *General Construction Co.*, 269 U. S. 385, 391; *Champlin Refining Co.* v. *Corporation Commission*, 286 U. S. 210, 240-43. And, as illustrated by this case, the use of the emergency suspension power (R. 23, 29) can be summarily utilized without the benefit of a bill of particulars. It is difficult to perceive how this promotes, or develops air commerce as conceived by the framers of Section 2 of the Act. Nor can this be said to encourage new airmen to come into this field especially at this time when experienced pilots are in acute supply.

III.

THE COURT OF APPEALS HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT.

Section 903(b) of the Act (49 U. S. C. A. 623(b)(1)) details the procedure in respect to civil penalties for violation of Title VI (the authority for promulgating Civil Air Regulations). Paragraph (4) of that Section states:

> "(4) The Supreme Court of the United States, and under its direction other courts of the United States, may prescribe rules regulating such proceedings in any particular not provided by law."

Reported cases of these decisions are rare and, so far as we are aware, this Court has never had occasion to prescribe, or direct other courts to prescribe, such rules not otherwise provided by law.

The present atrophic condition of Sections 901 and 903 is a result of administrative legislation and is inconsistent with the substantial body of law that must have been anticipated by the Congress[1] in order to have induced it to provide this important provision. A glance at Titles V, VI and VII (the only parts of the Act subject to the civil penalties of Section 901) will demonstrate that this congressional foresight could be predicated only upon anticipated judicial proceedings involving penalties for violations of the regulations promulgated under Title VI.

This premise considered, it is respectfully urged that it is of importance to the segment of the public involved in interstate and foreign air commerce that this Court consider this case to determine in what cases the holders of certificates issued by the Civil Aeronautics Administration are entitled to judicial process and a trial by jury.

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1. See speech by Senator McCarran, 83 Cong. Rec. 6634 (May 9, 1938).

CONCLUSION.

That the order herein is primarily penal there can be no doubt; proper perspective will manifest the clear fact that Congress never intended the Respondent Board to have punitive powers. And for good reason, as illustrated by this case, such power not only deprives the accused airman of due process but frustrates and hinders the development of air commerce as contemplated by the Civil Aeronautics Act of 1938.

This case, then, has significance to all Civil Aeronautics Administration Certificate-holders and to air commerce in general. It is submitted, therefore, that the Writ of Certiorari should be granted.

Respectfully submitted,

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OPINION.

(248 F. 2d 761.)

IN THE UNITED STATES COURT OF APPEALS
For the Seventh Circuit.

No. 11989. SEPTEMBER TERM AND SESSION, 1957.

CHARLES R. HARD, *Petitioner*,
v.
CIVIL AERONAUTICS BOARD, *Respondent*.
} On Petition For Review Of An Order Of The Civil Aeronautics Board.

October 8, 1957.

Before FINNEGAN and SCHNACKENBERG, *Circuit Judges*, PLATT, *District Judge*.

FINNEGAN, *Circuit Judge*. A protocol statement, part of the Congressional declaration of policy in § 2 of the Civil Aeronautics Act of 1938[1] is the main prop for Board[2] action under § 609 of the Act:

> "Sec. 2. In the exercise and performance of its powers and duties under this Act, the Authority [Civil Aeronautics Authority, now CAB] shall consider the following, among other things, *as being in the public interest* . . .

1. 52 Stat. 973, 980; 49 U. S. C. A. § 402.

2. Civil Aeronautics Board. See 54 Stat. 1235 for the transfer of Civil Aeronautics Authority; 1940 Reorg. Plan No. IV, § 7, effective June 30, 1940, 5 F. R. 2421.

(b) The regulation of air transportation in such manner as to recognize and preserve the inherent advantages of, assure the highest degree of safety in [air] transportation . . . (italics supplied)"

Section 609, in relevant part provides that: "The Authority . . . from time to time . . . may reexamine any airman, and, after investigation, and upon notice and hearing, may alter, amend, modify, or *suspend*, in whole or in part, any type certificate . . . airman certificate . . . *if the interest of the public so requires*, or may revoke, in whole or in part, any such certificate for any cause which, at the time of revocation, would justify the Authority in refusing to issue to the holder of such certificate a like certificate. In cases of *emergency, any such certificate may be suspended*, in whole or in part, for a period not in excess of thirty days, without regard to any requirement as to notice and hearing. The Authority shall immediately give notice of such suspension to the holder of such certificate and shall enter upon a hearing which shall be disposed of as speedily as possible. During the pendency of the proceeding the Authority may further suspend such certificate, in whole or in part, for an additional period not in excess of thirty days."[3]

Challenging a final order of CAB suspending his airline transport pilot rating for six months (with a credit for sixty days) Hard invoked our jurisdiction under § 1006 of the Act[4] coupled with § 1009 of the Administrative Procedures Act,[5] seeking reversal of that decision because it is grounded on the Board's conclusion that: ". . . the accident itself, together with a substantial suspension of . . . [Hard's] airline transport rating, *would provide a sufficient deterrent against* . . . [Hard] *or other pilots*

3. 52 Stat. 1011; Emphasis supplied.
4. 52 Stat. 1024, as amended; 49 U. S. C. § 646(a).
5. 60 Stat. 237; 5 U. S. C. § 1001, *et seq.*

taking similar risks with their passengers' lives." Without disputing the facts concerning his accident, Hard attacks the Board's jurisdiction to impose on him what he categorizes as a "penalty"; while buttressing his contention with the argument that it was error for the Board to try a case under § 609 on a theory that he lacks qualifications for an airline transport pilot rating, and then impose deterrent sanction despite finding him qualified. And in reliance on § 903(b)(1) Hard, the petitioner, asserts he is entitled to a trial by jury on issues involving civil penalties.

By his various points urged in this review, Hard would constrict the Board's power, to suspend his airline transport rating, to only the case where it found him unqualified or lacking ability to fly aircraft. The Board, on the other hand, reading and synthesizing § 2 and § 609 envisages a broad grant of power encompassing deterrent action when "the interest of the public" safety "so requires." In other words this administrative agency charged with "assuring the highest degree of safety" in air transportation contends that § 609 supplies authority for making an example of Hard in order to deter him and other airline pilots from jeopardizing the safety of travelers by air. "Penalty," as a symbol repeatedly used by this petitioner is singularly ineffective for gauging the scope of power granted the Board by Congress. Power and jurisdiction flow from the total piece of legislation, under examination, for that reason the answer eludes capture with the single word "penalty." Legislative history and experience under the Act combine in firmly suggesting an interpretation at odds with the limited view put forward by this petitioner. At any rate the conclusion petitioner suggests—that the Board mandated a "penalty" is unpersuasive rather than a logically compelling linguistic technique. We think the Board's order is consonant with the Congressional grant

of power and consistent with achieving the statutory aim spelled out as the "highest degree of safety." Whether the Board's order has salutary effect is beside the mark for all the agency can do is strive for protection of the public traveling by aircraft. But the problem engendered by this appeal is, of course, not solved in isolation. For, as we show below, Hard participated in a serious episode appraised by the examiner as "marginal" with regard to fault and responsibility. What Hard contends for would drive the Board into an area of sharp black and white, leaving the gray zone unprotected when, in the exercise of its discretion, a qualified airline pilot's behavior merits suspension rather than revocation of rating.

After a non-fatal accident on February 17, 1956, at Owensboro, Kentucky, involving an Eastern Air Lines aircraft, Hard was piloting, his airline transport pilot rating (ATR) was suspended, on an emergency basis, for sixty days. During that suspension period the Administrator of Aeronautics filed a complaint with the Civil Aeronautics Board seeking a suspension or revocation of the ATR held by this petitioner. An examiner for CAB found that the 60 days suspension was in the public interest but that there was no violation of Civil Aeronautics Regulations. CAB, on review, ordered petitioner's airline transport pilot rating suspended for six months. The impact of the Board's order, stayed during this court's review, precludes petitioner from serving as an airline captain during the suspension period established by the Board, though he may act as a co-pilot by virtue of other unrevoked licenses currently held by him.

Lying behind the Board's ultimate action in ordering Hard's suspension for four months (crediting him with two months period under their emergency order) is this pilot's approach to the Owensboro Airport for landing under instrument conditions due to rain in the area. After

breaking through the overcast north of the field, petitioner determined to land on Runway 5 which runs to the northeast, a course of action which required that the aircraft be maneuvered to a point southwest of the field so that the aircraft could be landed in a northeasterly direction. Hard, piloting the aircraft during this approach, proceeded southwest to a point found by the Board to be approximately one-half mile to the left of the southwest end of Runway 5. He then began a descending and banking U turn to the left to enter the runway. The left bank steepened sharply on the approach; power was applied and the aircraft rolled to the right; and the right wing struck the ground at a point 330 feet short of the runway and 125 feet to its right. The aircraft was demolished, but none of the twenty-three persons on board sustained any serious injury. At the proceedings it was the Administrator's contention, and the Board so found in effect, that Hard had not allowed sufficient lateral suspension between the end of the runway and the point at which the turn began to permit a normal turn into the runway; that he persisted in attempting to land when it became apparent that a landing could be accomplished only through acrobatic maneuvers. There was no finding by the Board that Hard lacked flying ability.

Relying on § 609, the Administrator filed a complaint with CAB, on March 16, 1956, requesting revocation or suspension of petitioner's certificate based on alleged lack of qualification. CAB, through its Bureau of Safety Investigation (64 Stat. 972, 49 U. S. C. §§ 581, 592), held public hearings on March 22, 1956 and took testimony of witnesses, including this petitioner. Petitioner responded to the Administrator's complaint with an answer and motion to dismiss; the hearing examiner overruled the motion. Subsequently a trial on the merits was held by the Board's examiner and he found, in substance, that though the emergency suspension was in the public interest

there had been no violation of any rule, regulation or statute—or, succinctly put: Hard had not been shown to be unqualified to fly and that disciplinary action was uncalled for in the circumstances. The examiner's decision was appealed, June 1, 1956, by the Administrator to the Board. After the examiner's decision, but before the Board's final suspension order, its accident investigation report was issued, containing *inter alia* this statement: "The Board is of the opinion that these factors [outlined in the report] indicate poor planning and execution of the approach by Captain Hard." Several months later, the Board wrote its decision and stated among other aspects:

> "We agree with the Administrator that disciplinary action is called for in this case, and that the Board could not, by failure to impose a sanction, tacitly condone a course of action, which, even if no accident had resulted, would have brought an aircraft to within inches of disaster. On the other hand, we question whether respondent's conduct on this flight was so egregious as to require revocation in the public interest, when we consider his eleven year record as a captain for Eastern and over 8,000 hours of flying experience without a previous incident of this type, or any disciplinary action for violations of safety rules. This does not mean that a single violation by an experienced pilot cannot ever call for revocation of his rating, for in flagrant cases the Board has ordered revocation. But on the facts here involved, we believe that the carelessness shown is not so egregious as to point to the ultimate sanction of revocation. In our judgment, the accident itself, together with a substantial suspension of his airline transport rating, would provide a sufficient deterrent against respondent or other pilots taking similar risks with their passengers' lives.
>
> Accordingly, we find a six month suspension should be imposed upon respondent, . . ."

From its factual premises, that administrative logic is understandable and, again we comment on the absence of

a contest over the fact findings concerning the accident. To be sure the suspension of Hard, a qualified airman, at first appears as an arbitrary or unauthorized action but we think there is ample statutory foundation supporting the power asserted by the Board. Nothing we have found in the Act manifests a legislative purpose to hobble this agency in its exercise of discretion. Policy formulation is a legislative function.

Wilson v. *C. A. B.*, 244 F. 2d 773 (D. C. App. 1957)[6] currently pending on petition for certiorari is closely analogous to Hard's case and apparently the District of Columbia Court of Appeals was impressed by the Board's history that: "From the effective date of the Act of 1938 through June 20, 1956, the Board has suspended approximately 4000 airmen for violation of rules, without findings that they lacked competence or qualifications and without requiring re-examination before reinstatement." By a marginal note in its brief filed in our court the Board has supplied us with similar information. While, of course, a persistent course of error could not override judicial judgment, courts do and have consistently placed authoritative weight on interpretative rules and practices consistently followed over long periods by administrative agencies. *United States* v. *Shreveport Grain & Elevator Co.*, 287 U. S. 77 (1932), *Norwegian Nitrogen Products Co.* v. *United States*, 288 U. S. 294 (1933). Without relying on the *Wilson* case we would leave the order brought before us for scrutiny undisturbed because in our opinion the Board acted within permissible limits of administrative interpretation circumscribed by the power and authority granted in §§ 2 and 609.

We find nothing in the record showing any steps taken by petitioner for deferment of the accident report at the Board level, despite his obvious awareness of the investi-

6. Supreme Court Doc. No. 434, 26 L. W. 3084.

gation. *Federal Trade Commission* v. *Cement Institute*, 333 U. S. 683 (1948) adequately offsets petitioner's claim of pre-judgment by the Board. See Davis, Administrative Law, Chapter 9 (1951). Indeed, the absence of revocation manifests treatment of pilot Hard inconsistent with that argument his counsel now presses on us.

We affirm the Board's order presented for review by the petition filed in our court.

ORDER AFFIRMED.

STATUTES INVOLVED.

The Civil Aeronautics Act of 1938 (52 Stat. 973) as amended, (49 U. S. C. 401 *et seq.*), provides in part:

Declaration of Policy.

Sec. 2. [*52 Stat. 973, 980, 49 U. S. C. 402*] In the exercise and performance of its powers and duties under this Act, the Board shall consider the following, among other things, as being in the public interest, and in accordance with the public convenience and necessity—

(a) The encouragement and development of an air-transportation system properly adapted to the present and future needs of the foreign and domestic commerce of the United States, of the Postal Service, and of the national defense;

(b) The regulation of air transportation in such manner as to recognize and preserve the inherent advantages of, assure the highest degree of safety in, and foster sound economic conditions in, such transportation, and to improve the relations between, and coordinate transportation by, air carriers.

(c) The promotion of adequate, economical, and efficient service by air carriers at reasonable charges, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices;

(d) Competition to the extent necessary to assure the sound development of an air-transportation system properly adapted to the needs of the foreign and domestic commerce of the United States, of the Postal Service, and of the national defense;

"(e) The regulation of air commerce in such manner as to best promote its development and safety; and

(f) The encouragement and development of civil aeronautics.

201(b) There shall be in the Board an Administrator who shall be appointed by the President by and with the advice and consent of the Senate, and who shall receive a salary at the rate of $15,000 per annum.

SEC. 301. [*52 Stat. 985, 49 U. S. C. 451*] The Administrator is empowered and directed to encourage and foster the development of civil aeronautics and air commerce in the United States, and abroad, and to encourage the establishment of civil airways, landing areas, and other air navigation facilities. The Administrator shall cooperate with the Board in the administration and enforcement of this Act.

SEC. 401(h) The Board upon petition or complaint or upon its own initiative, after notice and hearing, may alter, amend, modify, or suspend any such certificate, in whole or in part, if the public convenience and necessity so require, or may revoke any such certificate, in whole or in part, for intentional failure to comply with any provision of this title or any order, rule, or regulation issued hereunder or any term, condition, or limitation of such certificate: *Provided*, That no such certificate shall be revoked unless the holder thereof fails to comply, within a reasonable time to be fixed by the Board with an order of the Board commanding obedience to the provision, or to the order (other than an order issued in accordance with this proviso), rule, regulation, term, condition, or limitation found by the Board to have been violated. Any interested person may file with the Authority [Board] a protest or memorandum in support of or in opposition to the alteration, amendment, modification, suspension, or revocation of a certificate.

Sec. 609 (52 Stat. 1011, 49 U. S. C. A. 559)

"The Board may, from time to time, reinspect any aircraft, aircraft engine, propeller, appliance, air navigation facility, or air agency, may reexamine any airman, and, after investigation, and upon notice and hearing, may alter, amend, modify, or suspend, in whole or in part, any type certificate, production certificate, airworthiness certificate, airman certificate, air carrier operating certificate, air navigation facility certificate, or air agency certificate if the interest of the public so requires, or may revoke, in whole or in part, any such certificate for any cause which, at the time of revocation, would justify the Administrator of Civil Aeronautics in refusing to issue to the holder of such certificate a like certificate . . . ."

Sec. 702 (49 U. S. C. A. 592 Reorg. Plan No. IV 1940 52 Stat. 1012, 49 U. S. C. A. 581, 582).

(a) It shall be the duty of the Board to

(1) Make rules and regulations governing notification and report of accidents involving aircraft;

(2) Investigate such accidents and report the facts, conditions, and circumstances relating to each accident and the probable cause thereof;

(3) Make such reports public in such form and manner as may be deemed by it to be in the public interest; and

(4) Ascertain what will best tend to reduce or eliminate the possibility of, or recurrence of, accidents by investigating complaints filed with the Board, and by conducting special studies and investigations, on matters pertaining to safety in air navigation and the prevention of accidents.

Sec. 901 (52 Stat. 1015, 49 U. S. C. A. 621)

"(a) Any person who violates (1) any provision of subchapters V, VI, and VII of this chapter, or any provision of subsection (a) (1) of section 181 of this title, or (2) any rule or regulation issued by the Postmaster General under this chapter, shall be subject to

a civil penalty of not to exceed $1,000 for each such violation. Any such penalty may be compromised by the Board or the Postmaster General, as the case may be . . . ."

"(b) In case an aircraft is involved in such violation and the violation is by the owner or person in command of the aircraft, such aircraft shall be subject to lien for the penalty . . . ."

Sec. 903 (52 Stat. 1017, 49 U. S. C. A. 623)

"(b) (1) Any civil penalty imposed under this chapter may be collected by proceedings in personam against the person subject to the penalty . . . Such proceedings shall conform as nearly as may be to civil suits in admiralty, except that either party may demand trial by jury of any issue of fact, if the value in controversy exceeds $20, and the facts so tried shall not be re-examined other than in accordance with the rules of the common law . . . ."

"(4) The Supreme Court of the United States, and under its direction other courts of the United States, may prescribe rules regulating such proceedings in any particular not provided by law."

REGULATIONS, INVOLVED.

C.A.R. 21.16, 14 C.F.R. 21.16 *Aeronautical experience.*

An applicant for an airline transport pilot rating shall hold a valid commercial pilot rating, or equivalent as determined by the Administrator, and shall meet the following aeronautical experience requirements:

(a) Applicant shall have had at least 250 hours of flight time composed of time as pilot in command, or time as copilot actually performing the duties and functions of a pilot in command under the surveillance of the pilot in command, or any combination thereof. Of this time, at least 100 hours shall have been cross-country flight time, and at least 25 hours shall have been night flight time. Flight time shown in fulfillment of the requirements of this paragraph may also be used for the purposes of paragraph (b) of this section.

(b) Applicant shall have had at least 1,200 hours of flight time as pilot within the last 8 years, of which

(1) 5 hours shall have been had within 60 days immediately preceding the date of application;

(2) 500 hours shall have been cross-country flight time;

(3) 100 hours shall have been night flight time;

(4) 75 hours shall have been instrument time under actual or simulated instrument conditions of which not less than 50 hours shall have been in actual flight.

C.A.R. 21.24, 14 C.F.R. 21.24.

(d) Nothing in this section shall be construed to deny or defeat the jurisdiction of the Federal courts, the Administrator, or the Board to impose any authorized sanc-

tion, including revocation of the certificate, for a violation of the act or of the regulations in this sub-chapter occurring during the effective period of the certificate.

C.A.R. 21.41, 14 C.F.R. 21.41 *Passenger carrying.*

A certificated airline transport pilot shall not pilot any aircraft carrying any person other than members of the crew thereof, certificated airmen carried in air carrier aircraft in furtherance of their official duties, or a certificated instructor rated for the aircraft operated, unless, within the 90 days immediately preceding, he shall have made at least 3 take-offs, and three landings to a full stop, in an aircraft of the same category (§ 21.34) and if an airplane, within the same class (§ 21.35 (a)) as that of the aircraft in which any such person is carried.

C.A.R. 21.42, 14 C.F.R. 21.42 *Recent experience requirements.*

(a) *Passenger flight (day and night).* A certificated airline transport pilot shall not pilot an aircraft carrying any person other than the members of the crew thereof, certificated airmen carried in air carrier aircraft in furtherance of their official duties, or a certificated instructor rated for the aircraft operated, unless within the preceding 3 calendar months he shall have made and logged at least 3 take-offs and landings to a full stop in an aircraft of the same category, class, and type as that of the aircraft in which such person is carried.

(b) *Instrument flight.* A certificated airline transport pilot, who within the preceding 6 calendar months has not flown and logged at least 2 hours of flight time solely by reference to instruments under either actual or properly simulated instrument flight conditions, shall not pilot an aircraft under such conditions until he has flown and logged at least 2 hours of such flight time accompanied by a cer-

tificated pilot of at least private grade holding an appropriate category, class, and type rating for the aircraft and authorized to operate aircraft under instrument conditions.

C.A.R. 40.301, 14 C.F.R. 40.301 *Pilot recent experience.*

No air carrier shall schedule a pilot to serve as such in scheduled air transportation unless within the preceding 90 days he has made at least 3 take-offs and 3 landings in the airplane of the particular type on which he is to serve.

C.A.R. 40.302, 14 C.F.R. 40.302 *Pilot checks.*

(a) Line check: Prior to serving as pilot in command, and at least once each 12 months thereafter, a pilot shall satisfactorily accomplish a line check in one of the types of airplanes normally to be flown by him. This check shall be given by a check pilot who is qualified for the route. It shall consist of a least a scheduled flight between terminals over a route to which the pilot is normally assigned during which the check pilot shall determine whether the individual being checked satisfactorily exercises the duties and responsibilities of pilot in command.

(b) Proficiency check: (1) An air carrier shall not utilize a pilot as pilot in command until he has satisfactorily demonstrated to a check pilot or a representative of the Administrator his ability to pilot and navigate airplanes to be flown by him. Thereafter, at least twice each 12 months at intervals of not less than 4 months or more than 8 months, a similar pilot proficiency check shall be given each such pilot. Where such pilots serve in more than one airplane type, the pilot proficiency check shall be given in the larger airplane type at least once each 12 months.

C.A.R. 60.12, 14 C. F. R. 60.12 *Careless or reckless operation.*

No person shall operate an aircraft in a careless or reckless manner so as to endanger the life or property of others.

PART 303—RULES OF PRACTICE IN AIRCRAFT ACCIDENT INQUIRIES.

§ 303.1 (14 C.F.R. 303.1) *Nature of inquiry.* Aircraft accident inquiries are held by the Board as a part of the investigation of accidents involving aircraft in order to determine the facts, conditions, and circumstances relating to each accident and the probable cause thereof and to ascertain measures which will best tend to prevent similar accidents in the future. It is purely a fact-finding procedure, and there are no formal pleadings or issues and no adverse parties and during the course of the hearing no objections to any matter will be entertained from any party to the investigation or any other person. Aircraft accident inquiries are not subject to the provisions of Secs. 4, 5, 7, 8, or 10 of the Administrative Procedure Act.

§ 303.2 *Institution of inquiry.* The Director, Bureau of Safety, shall, on behalf of the Board, order an inquiry into an accident involving aircraft whenever he deems it necessary in the public interest.

§ 303.13 *Examination of Witnesses.* (a) Witnesses will be examined by the Board of Inquiry. Following such examination the parties to the investigation who have indicated at the prehearing conference their desire to examine such witnesses will be given an opportunity to do so. If a party to the investigation who has not indicated at the prehearing conference an intention to examine a witness, desires to do so, he may make a request to the Presiding Officer along with his justification as to why such examination is now deemed necessary. The Presiding Officer will then determine whether to permit examination by such party to the investigation.

(b) Materiality, relevancy and competency of witness'

testimony, exhibits or physical evidence will not be the subject of objections by a party to the investigation or any other person, but such matters will be controlled by rulings of the Presiding Officer on his own motion. If the examination of a witness by a party to the investigation is interrupted by a ruling of the Presiding Officer, opportunity will be given to show materiality, relevancy or competency of the testimony or evidence sought to be elicited from the witness.

§ 303.14 *Evidence.* The Presiding Officer shall receive all testimony and exhibits which might be of aid in determining the cause of the accident. He may exclude any testimony or exhibits which are not pertinent to the inquiry or which are merely cumulative. He may withhold from public disclosure any evidence, pending a final determination by the Board as to whether it is in the public interest to release such evidence.

Board Report.

§ 303.22 *Basis of report.* The Board's report as to the facts, conditions, and circumstances relating to the accident and the probable cause thereof shall be based upon the docket of the inquiry, together with any other information which has come to the attention of the Board and its staff.

In the Supreme Court of the United States

OCTOBER TERM, 1957

No. 734

CHARLES R. HARD, PETITIONER

v.

CIVIL AERONAUTICS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE CIVIL AERONAUTICS BOARD IN OPPOSITION

The issue presented by this petition is the same as that in *Wilson* v. *Civil Aeronautics Board,* No. 434, this Term, in which this Court denied certiorari on November 12, 1957 (355 U. S. 870): namely, whether Section 609 of the Civil Aeronautics Act, which empowers the Civil Aeronautics Board to suspend a pilot "if the interest of the public so requires," authorizes the Board to suspend the certificate of an airline pilot found to have violated the Civil Air Regulations as a deterrent sanction against violation of those regulations. For the reasons set forth in the brief in opposition in *Wilson,* to which we respectfully refer the Court, it is submitted that the decision below, holding that the Board may suspend

as a deterrent sanction, is clearly correct, and that there is no occasion for review by this Court.

The only contention made by petitioner which was not made in *Wilson* is that the Board allegedly prejudged the matter because it previously had held, in an accident investigation conducted under Section 702 of the Act, that the accident which led to the suspension of petitioner's license had been his fault (Pet. 14–18). The short answer to this contention—a contention which, we note, was not made before the Board and therefore is not open to petitioner upon judicial review (see Section 1006 (e), Civil Aeronautics Act (49 U. S. C. 646 (e)); *Federal Power Commission* v. *Colorado Interstate Gas Co.*, 348 U. S. 492, 498–501)—is that the Board's decision in the accident investigation did not purport to determine whether petitioner's conduct constituted grounds for suspension, and therefore did not constitute prejudgment of the instant case. See *Federal Trade Commission* v. *Cement Institute*, 333 U. S. 683, 700–703; *United States* v. *Morgan*, 313 U. S. 409, 420–421.

Accordingly, it is respectfully submitted that the petition for certiorari should be denied.

J. Lee Rankin,
Solicitor General.

February 1958.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 734

CHARLES R. HARD, *Petitioner*

v.

CIVIL AERONAUTICS BOARD, *Respondent*

MOTION FOR LEAVE TO FILE A BRIEF AMICUS CURIAE IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI AND BRIEF IN SUPPORT THEREOF

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IN THE

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MOTION FOR LEAVE TO FILE A BRIEF AMICUS CURIAE IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

Comes now the Air Line Pilots Association, International by Lloyd Fletcher, its attorney, and moves this Honorable Court for leave to file its brief *amicus curiae* herein in support of the above named petitioner's Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit. Said brief *amicus curiae* is attached hereto, and this Motion for leave to file the same is based upon the following grounds:

(1) The Air Line Pilots Association, International, is a voluntary unincorporated association, with a membership in excess of 13,000 commercial air line pilots in the

employ of scheduled United States air transport carriers. Among other things, the Association has for its objectives, the promotion of the interests of the air line piloting profession; the safeguarding of the rights, individually and collectively, of the members of the Association; and the promotion and safeguarding of safety in scheduled air transportation.

(2) The Air Line Pilots Association, on behalf of its members, is vitally interested in all laws, rules, regulations, orders and decisions promulgated by legislatures, administrative agencies and judicial tribunals pertaining to the air line piloting profession and the air line industry. In keeping with this interest the Association assumed an active part in the formulation and development of the Civil Aeronautics Act of 1938, as amended, and has always taken a keen and active interest in all orders, rules and regulations of the Civil Aeronautics Administrator and of the Civil Aeronautics Board affecting its members and the air line industry.

(3) Rule 42 of the Revised Rules of this Court require that an applicant for permission to file a brief *amicus curiae* shall "set forth facts or questions of law that have not been, or reasons for believing that they will not adequately be, presented by the parties, and their relevancy to the disposition of the case."

It will appear from the record herein that, throughout this proceeding, this Association has lent its aid and assistance to this individual petitioner as a member of the Association in the presentation of his defense. It continues to do so. However, it is the wish of the Air Line Pilots Association, as such, to lay before this Court the views of the Association regarding the overall importance of the issues involved herein and its reasons for believing that, in the interests of safety in aviation, this Court of last resort should grant the Petition for Certiorari and resolve with finality the jurisdictional question involved. The

actual adversaries to the proceeding may properly be expected to confine their arguments to the narrow view of the issues. There is, however, a broader aspect to the case dealing with the efficient determination of the cause of an aircraft accident and the prevention of a recurrence thereof. This Association believes the decision below may affect adversely this important safety consideration due to its possible effect on the future conduct of the individual members of this Association.

WHEREFORE, it is respectfully requested that this Court enter its Order granting unto the Air Line Pilots Association, International, permission to file the attached brief as *amicus curiae* herein, pursuant to the provisions of Rule 42 of the Revised Rules of this Court. Counsel for respondent withheld consent to the filing of said brief.

Respectfully submitted

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 734

CHARLES R. HARD, *Petitioner*

v.

CIVIL AERONAUTICS BOARD, *Respondent*

BRIEF FOR AIR LINE PILOTS ASSOCIATION, INTERNATIONAL AMICUS CURIAE

INTRODUCTORY STATEMENT

Air Line Pilots Association, International, (hereinafter sometimes referred to as ALPA) is a voluntary unincorporated association with a membership of over 13,000 commercial air line pilots in the employ of scheduled United States air transport carriers. For the reasons heretofore specified in its Motion for leave to file this brief

amicus curiae, this Association has a vital interest in the outcome of this proceeding.

In the fullest confidence that counsel for the parties will fully develop before the Court the narrow issues herein as they involve the petitioner, counsel for ALPA does not intend herein to dwell at length upon case analysis, since to do so might well prove unduly repetitive of material in the briefs of the parties. Nonetheless, ALPA believes the position taken in this case by the petitioner-pilot is eminently correct, and therefore reference to, and analysis of authorities in support thereof will be briefly made for the purpose of, it is hoped, helpful emphasis.

In addition, it is the sincere desire of the Association to serve the function of *amicus curiae* by inviting the Court's attention to certain broad considerations inherent in the present problem and bearing on the constant improvement of safety in future air transportation which is of such vital concern to this Association and its entire membership.

In this connection the Court should be advised that ALPA participates in the investigation of all major air carrier accidents, a participation which the Association understands is welcomed and encouraged by the Civil Aeronautics Board. Certainly, in turn, ALPA welcomes and appreciates the opportunity to be of assistance in these laudable efforts of the Board to determine the cause of an accident in order to prevent its recurrence.

In recognition of its serious responsibilities in this regard, ALPA has long maintained an elaborate air safety organizational structure comprised basically of the men who actually fly the airliners of this country and who, in the last analysis, bear the primary responsibility for the lives of their passengers and crew. In addition to practically day by day work on safety problems by local

and regional committees, together with the coordinating activities of ALPA's Engineering and Air Safety Department, an annual Air Safety Forum is conducted for the purpose of considering all problems bearing on safety in flight. In this regard, it should be noted that ALPA readily admits there are such things as "pilot-error" accidents. However, it holds that no pilot ever erred deliberately or in the interest of self-destruction. ALPA is interested in the reason behind the error and feels that any accident written off simply as "pilot-error" has probably not been adequately investigated. For example, did the error originate in design error, fatigue limits, cockpit booby traps, an inadequate training program, or some other deficiency?[1] ALPA feels that this viewpoint must be represented at all accident investigations if the operational aspect is to be thoroughly explored and the maximum learned from each accident.

For the reasons assigned in Part 2 of the Argument herein, ALPA is concerned that the decision below may have endangered this worthwhile activity. First, however, it is appropriate to consider whether, as a matter of law, the Court below and the Board have erred in their construction of the statute involved.

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[1] In this connection, the President's Special Board of Inquiry on Air Safety stated in its "Report to the President of the United States" on December 29, 1947 as follows:

> "Errors will be made in the operation of aircraft, but the lessening of the potentiality for error, and planning so as to make errors, when committed, less costly, are the more important goals."

To the same effect, see the excellent analysis in Sutton, "Let's Eliminate a Statistical Stigma 'Pilot Error,'" *Flying*, Vol. 62, No. 2, February, 1958, Ziff-Davis Publishing Co., N.Y., N.Y.

ARGUMENT

1. Section 609, Civil Aeronautics Act of 1938, as amended, is purely a remedial statute, and a careful consideration of its wording, purpose and legislative history discloses no power to punish a certificate holder

The respondent's power to suspend an airman certificate is contained in Section 609 of the Act, which reads in pertinent part, as follows:

> "The Board may, from time to time, *reinspect* any aircraft, aircraft engine, propeller, appliance, air navigation facility, or air agency, may *reexamine any airman*, and, after investigation, and upon notice and hearing, may *alter, amend, modify, or suspend*, in whole or in part, any type certificate, production certificate, air-worthiness certificate, *airman certificate*, air carrier operating certificate, air navigation facility certificate, or air agency certificate *if the interest of the public so requires*, or may revoke, in whole or in part, any such certificate for any cause which, at the time of revocation, would justify the Administrator of Civil Aeronautics in refusing to issue to the holder of such certificate a like certificate . . ." Act of June 23, 1938, c. 601, Title VI, Sec. 609, 52 Stat. 1011, 49 U.S.C.A. 559. (Italics Supplied).

This section of the Act falls within Subchapter VI entitled "Civil Aeronautics Safety Regulations," and obviously Section 609 is designed specifically to enable respondent, as a remedial matter, to "reinspect" aircraft and their components and "reexamine" the competency of airmen, and thereafter, where the public interest so requires, to alter, amend, modify, suspend and revoke certificates previously issued under powers granted in preceding sections. No power is specifically delegated under Section 609 to punish an airman, air carrier, aircraft, etc. as a deterrent sanction, for disciplinary purposes, or otherwise. Clearly, as petitioner points out, no such punishment power should be, or will be implied. *Wallace* v. *Cutten*, 298 U.S. 229 (1936); *Iselin* v. *United States*, 270

U.S. 245 (1926). *A fortiori* is this true where not even a *casus omissus* is involved, for Congress specifically provided penalties for violations of the Act in an entirely separate title labeled "Title IX-Penalties," followed by "Civil Penalties, Safety and Postal Offenses." Sections 901-903.[2]

Research into the legislative history of the Act has failed to disclose any great amount of significant comment either in the Committee Reports or the Hearings which might be specifically helpful in construing the provisions here under construction. However, it is well known that the late Senator Pat McCarran was one of the most active legislators in the 1938 revisions of the country's aviation laws. On January 5, 1938, he introduced in the Senate a bill, S. 2, 75th Cong., 3d Sess., in which Section 276(d) dealing with suspension and revocation of aircraft, airman and related certificates, read as follows:

> "(d). The Authority may amend or modify any certificate or license issued under this part; and may suspend or revoke any such certificate or license when the holder thereof *fails to comply* with the provisions of this Part, or the orders, rules, *regulations*, or requirements of the Authority thereunder, or the terms and conditions of the certificate or license." (Italics Supplied).

Provisions substantially similar to those quoted above from S. 2 were contained in S. 3659, introduced on March 11, 1938 by Senator McCarran. See Sections 253, 276(d), and 280(a) of S. 3659. Then Senator Truman, who was Chairman of the Senate Subcommittee charged with re-

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[2] Even had there been a legislative inadvertence in the statute, *United States* v. *Weitzel*, 246 U.S. 533 (1917) warns that the judiciary must not supply the omission simply "because the court thinks the legislature should have made them (the statutes) more comprehensive." 246 U.S. 543.

sponsibility for the aviation bills, introduced a proposed substitute for S. 3659 on March 30, 1938. This substitute for the first time contained substantially the language now found in Section 609 and eliminated the language which had directly specified that violation of regulations would be grounds for suspension as contained in the earlier McCarran bills (S. 2 and S. 3659).

In explaining his substitute, Senator Truman informed the Senate Committee on April 6, 1938 that:

> "The difference between S. 3659 and the substitute with respect to safety regulation and related matters is to a large extent one of form and of structure. There is no power conferred by S. 3659, I believe, which is not also conferred by the substitute." Hearings before a Subcommittee of the Committee on Interstate Commerce, U. S. Senate, 75th Cong., 3d Sess., on S. 3659, p. 3.

However, in the same Hearings before the Subcommittee, Senator McCarran testified at page 11 as follows:

> "Again we come to the question: Should the agency enforcing the regulation provided by Congress, and the orders and rules promulgated by the agency for that purpose, assess the *penalties for violation* thereof, or should the party accused of such violation be afforded the protection of the courts? • • • I say my answer to that is: No legislation should be enacted that would deprive anyone of his day in court, or deprive anyone of his easy avenue into court." (Italics Supplied).

Later at page 160 of the same Hearings, in discussing the Truman substitute, Senator McCarran stated:

> "While in a broad way it may be possible to say that there is no power conferred by S. 3659 for improvement of safety and regulation of operations which is not also conferred by the substitute, comparison of the two leaves considerable doubt . . . • • •

> "Absence of a specific direction in the law may well result in denial by the courts of the existence of the power. * * * In respect of the licensing of airmen, it is believed that the provisions of S. 3659 follow the practice in effect, at least until recently. There is no objection to a reasonable modification of these provisions, *but the provisions of the substitute again leave too much uncertainty in their application.*" (Italics Supplied).

Subsequently, on April 14, 1938, Senator McCarran introduced another bill (S. 3845) embodying, insofar as the present problem is concerned, the provisions of Senator Truman's substitute, including the language of Section 609. This bill became the Civil Aeronautics Act of 1938.[3]

While neither Senator McCarran nor Senator Truman addressed themselves *specifically* to the problem at hand, it is apparent that Senator McCarran entertained serious misgivings concerning the elimination of specific provisions from S. 3659 in favor of "nebulous" grants of power. Hearings Before a Subcommittee of the Committee on Interstate Commerce, *supra*, p. 161. ALPA believes that the elimination by Congress of the earlier language specifically delegating power to suspend for violation should, in Senator McCarran's words above, "result in denial by the courts of the existence of the power." Certainly, the foregoing hardly bears out the Circuit Court's unsupported statement below that "there is ample statutory foundation supporting the power asserted by the Board." (Pet. App. 31).

Finally, it is important to consider the purpose of Section 609. Bearing in mind constantly that the section is a part of the Subchapter dealing only with the respond-

[3] The debates disclose that, because of Senator McCarran's long association with aviation matters, Senator Truman desired the bill to be enacted to be one introduced and sponsored by Senator McCarran. (83 Cong. Rec. 6725).

ent's power and duty "to promote safety of flight" (Sec. 601), and that penalties for violations are fully provided in another Subchapter, it becomes obvious that the power conferred by Section 609 is solely remedial, e.g., the certificate of a defective aircraft or air navigation facility may be suspended in the interests of safety until the defects are corrected, or if they cannot be corrected, then the certificate may be altered or modified so as to restrict the freedom of its operation; the airman certificate of a pilot who, on re-examination, has been found to have a visual deficiency may be altered so as to require the wearing of correcting lenses while flying aircraft; or the certicate may be suspended where it is found on re-examination that the holder is presently unqualified in piloting techniques until he has proven his attainment of suitable proficiency; etc.

The statutory phrase "reexamine any airman" seems clear and unambiguous. No dictionary definition need be cited to demonstrate that "reexamine" means to "examine again." Examine again for what? The answer to that question depends upon an analysis of the reason for the first examination of the airman.

When petitioner obtained his airline transport pilot certificate, such first examination consisted of his proving compliance with the minimum requirements set forth by respondent in its Civil Air Regulations, Part 21. These requirements set minimums with respect to age, character, citizenship, education, aeronautical knowledge, experience, and skill, and radio skill. In short, they deal *exclusively with qualifications* as an airline pilot. As petitioner has pointed out, the respondent's agent reexamined petitioner and found him qualified to hold the rating for which he was originally examined. In the face of such successful reexamination, respondent suspended petitioner's ATR for a six month period. Yet, by the plain wording of Section 609, respondent's right to suspend stems solely

from the power to "reexamine." Thus has respondent assumed a power clearly not delegated to it by Congress.

It seems quite obvious from a reading of the Board's decision below that what really troubled it was a doubt as to petitioner's exercise of good judgment in his approach to Owensboro Airport. Refusing to follow its Examiner's view that "the case is very close" (App. 35), the Board stated:

> "However, we do not believe that respondent would escape responsibility, even if the wind gust theory were credible, since it seems clear from the physical evidence as to the aircraft's position and heading at the time of the impact, that a reasonably prudent pilot would have realized in time to execute a missed approach procedure, that the aircraft was not in a position to make a safe landing." (App. 60).

Necessarily, this finding placed respondent, as a conscientious administrative agency, in a delicate dilemma. If petitioner were not "a reasonably prudent pilot," then Section 609 required respondent to *revoke* petitioner's ATR, and the Administrator quite logically so demanded. (App. 63). Clearly, however, respondent could not conscientiously conclude that petitioner was unfit to exercise the privilege of his rating; he had been reexamined successfully, and his long, clear record as an airline captain simply shouted to the contrary. (App. 64). So the Board suspended him punitively for six months, and the Court below affirmed, overlooking the exclusively remedial function of Section 609.[4]

In giving such a broad scope to Section 609, ALPA submits that the Circuit Court and the Board have forgotten the proper approach to statutory construction expressed in *Fong Haw Tan* v. *Phelan*, 333 U.S. 6, where this Court

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[4] As pointed out by petitioner at page 13 of his Petition, the grounding of an experienced airman simply makes him a less qualified pilot—at least, temporarily.

held that to render an alien subject to deportation as having been "sentenced more than once" to imprisonment for crime involving moral turpitude, the second crime must have been committed after imposition of the first sentence. A number of the Circuit Courts of Appeals had held to the contrary interpreting the statute liberally in favor of deportation and against the alien. This Court required the statute to be narrowly construed in favor of the individual, stating at page 10:

> "We resolve the doubts in favor of that construction because deportation (suspension of an airman's certificate) is a drastic measure and at times the equivalent of banishment or exile (the loss of a livelihood) . . . To construe this statutory provision less generously to the alien (the pilot) might find support in logic. But since the stakes are considerable for the individual, we will not assume that Congress meant to trench on his freedom beyond that which is required by the narrowest of several possible meanings of the words used." (Parenthetical clauses added for emphasis and comparison).

However, the Court below in construing the statutory words "if the interest of the public so requires", gave them the broadest possible meaning in derogation of the right of an individual *qualified* pilot to earn a livelihood. The *Tan* case, *supra*, clearly demonstrates the error inherent in such construction of a Congressional statute where a penalty or forfeiture is asserted.

2. Viewing the question herein in its broadest aspects, the Air Line Pilots Association believes that the impact of the decision below will be adverse to overall safety in aviation

Titles VI and VII of the Act make abundantly clear that a major function of the Board is the fostering and promotion of safety of flight. To this end, Title VII, Section 702 of the Civil Aeronautics Act, as amended, (52 Stat. 1013, 49 U.S.C.A. Sec. 582) provides in part as follows:

"(a) It shall be the duty of the Board to—

(1) Make rules and regulations governing notification and report of accidents involving aircraft;

(2) Investigate such accidents and report the facts, conditions and circumstances relating to each accident and the probable cause thereof;

* * * * *

(5) Ascertain what will best tend to reduce or eliminate the possibility of, or recurrence of, accidents by investigating complaints filed with the Board, and by conducting special studies and investigations, on matters pertaining to safety in air navigation and the prevention of accidents."[5]

It will be obvious that these duties were assigned to the Board by Congress in order that safety in flight might be made the subject of constant investigation and improvement. If, for example, the Board's investigation of an air accident should develop a fault in aircraft design, an inadequate navigation facility or technique, a defect in existing regulations, or any other condition contributing to or causing the accident, the Board is then empowered under its general safety powers contained in Title VI to take remedial action.

It will be equally obvious, however, that if such an investigation is to aid the Board in its duty of promoting safety of flight, there must be obtained a complete disclosure of facts from every available source. The pilots are, of course, the prime source for such factual data. They are the witnesses who, by the very nature of their jobs, are in the best position to know what happened to

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[5] Under Sections 701-2 of the original Act, these functions were performed by an independent Air Safety Board, one of whose members was required to "be an active airline pilot and shall have flown not less than three thousand hours in scheduled air transportation." The functions were transferred to respondent under 1940 Reorg. Plan No. IV, Sec. 7, 54 Stat. 1235.

their aircraft and by their experience with it to be able to relate and correlate cause and effect.

However, it is elementary that a witness who is distressed by the prospect of reprisal or punishment may be expected to withhold his testimony to the extent possible. This proposition has been most aptly stated by an expert in air accident investigative technique, Mr. G. I. Whitehead, Jr., Assistant Director of Claims, United States Aircraft Insurance Group. In an address to the Flight Safety Foundation, Inc., on June 18, 1954, wherein he discussed, among other things, certain observed defects in the Board's accident hearing procedures, Mr. Whitehead said:

> "It is not in human nature for a man to speak freely when he knows that he may be talking himself into a revocation of his certificate. And companies cannot long put up with a situation which brings them into court with two and one-half strikes before they get up to bat. Just as soon as self-interest is forced on a witness as the all important consideration, many of the safety benefits to the industry through the Board's findings of fact will be lost. I think that it is incumbent on the Civil Aeronautics Board people to recognize this and do something about it. It is neither healthy nor desirable to have a safety inquiry develop in an atmosphere of hostility."

In the cases of *Lewis H. Brubaker* and *Charles E. Olsen*, CAB Dockets Nos. SR. 2168, 2169, entered August 2, 1954, affirmed on another issue in *Lee* v. *Civil Aeronautics Board*, 96 U.S. App. D.C. 299, 225 F. (2d) 950 (1955), the Board has held that a suspension for disciplinary purposes is a "penalty" from which immunity is provided by Section 1004(i) of the Act. Generally speaking, the members of this Association, who have been involved in an aircraft accident and thereafter called as witnesses in the investigation hearing, desire to cooperate and are loathe to

claim their privilege against possible self-incrimination due to their understanding that in such event the respondent's Hearing Officers, rather than grant immunity under Section 1004(i), will simply adjourn the hearing. Knowing that their testimony is important, and being desirous of aiding in the determination of the true cause of the accident, the pilots in such situations, as a general rule, have merely waived the privilege.[6]

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[6] An example is provided by a recent accident investigation conducted by respondent's Hearing Officer Reed C. Tait into the reason for collapse of the landing gear on Piedmont Airlines, Douglas DC-3, N3947A while under the command of Captain H. C. Kelly at Charlottesville, Virginia on October 2, 1957. The following colloquy between counsel for Captain Kelly and the Hearing Officer appears at pp. 50-51 of the Record for November 12, 1957:

"Mr. Fletcher: • • • I should like to inquire whether it is the intention of the Examiner to extend immunity to Captain Kelly for his testimony under Section 1004(i) of the Act.

Mr. Tait: Well, I have not been asked yet.

Mr. Fletcher: May I say then—

Mr. Tait: Let me interpose one thing. If Captain Kelly wishes to avail himself of that provision of that Act, then Captain Kelly will have to ask me himself.

Mr. Fletcher: I understand that. May I inquire— Let me start this again. It is our desire to cooperate and in no way hamper this investigation, and consequently I should like to inquire of you whether Captain Kelly's claim of immunity under that Section would have any effect on your proceeding here this afternoon.

Mr. Tait: It most certainly would.

Mr. Fletcher: To the extent that you would adjourn the hearing, do you mean?

Mr. Tait: Probably, yes.

Mr. Fletcher: Then I think it fair to say, from my discussion with Captain Kelly, that it is his desire to cooperate with the Examiner and he will proceed to testify in this hearing. I think I speak for him in that respect, although he may wish to add something to it.

Mr. Tait: Do you, Captain?

Captain Kelly: No."

This Association is concerned that the now judicially approved use of Section 609 by respondent as a weapon of punishment may well create the undesirable "atmosphere of hostility" deplored by Mr. Whitehead above. It simply asks too much of a pilot, whose professional life may be at stake, to cooperate in the accident investigation by the same agency which claims the right to penalize him irrespective of his professional qualifications. For this reason alone, the safety investigation and any subsequent action to penalize should be conducted in independent forums, and the structure of the Act, as analyzed in Point 1 above, clearly shows that Congress wisely so intended.

The instant case provides an illustration of what can happen. According to respondent's Accident Investigation Report adopted July 5, 1956:

> "During the investigation and public hearing Captain Hard and Pilot Rozman related in detail the events concerning the accident." SA-316, p. 4

In that Report, respondent concluded that the probable cause of the accident was Captain Hard's "improperly executed final approach, resulting in a stall . . ." SA-316, p. 9. Meanwhile, on April 28, 1956, in a separate suspension proceeding against petitioner, the respondent's Hearing Examiner had concluded that "there is not a clear enough, well-marked line to say that Respondent (Hard) did something wrong getting into this situation," (App. 39) and, subject to appeal, the Hearing Examiner thereupon dismissed the proceeding. The Administrator's appeal to respondent Board was sustained, and on February 6, 1957, the Board suspended petitioner's ATR for six months as "disciplinary action." (App. 64). This action by respondent is based *inter alia* on what it calls petitioner's "admission" as to his distance from the runway on commencement of his turn. (App. 54, 56, 57). Thus, petitioner's cooperation in the investigative effort to determine the cause of the accident gave to the Board

what it must have deemed to be important evidence to support its disciplinary action.

That this record shows clear prejudgment by respondent contrary to the rule of *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260 is argued at length by petitioner on pages 14-17 of the Petition herein and will not be repeated here. It is the view of this Association, however, that the Board's difficulties in these respects stem from its failure to acknowledge that Congress wisely left the punishment of violators to the courts. See Sections 901-903.

CONCLUSION

It is submitted that Section 609, when properly construed, does not delegate to respondent the power to punish a qualified certificate holder for a violation of the Act or regulations. Accordingly, this Court is respectfully urged to review the decision below in order that an airline pilot may know whether his violation of a regulation may result in a penalty "not to exceed $1,000 for each such violation" (Sec. 901), or whether, as in this case, his single violation may result in a penalty (through suspension) amounting to considerably more than $1,000.

Respectfully submitted

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